Supreme Court, U.S.
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CASE NO. 03-

IN THE UNITED STATES SUPREME COURT

October Term 2003

FLORIDA ATTORNEY GENERAL,
Petitioner,

vs.

ROBERT ARTHUR HART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals exceeded the limits imposed by 28 U.S.C. § 2254(d) in granting habeas corpus relief to Respondent on a finding that the state court's decision that Respondent gave his statement voluntarily, knowingly and intelligently is contrary to clearly established federal law because the state court did not enumerate all of the factors it considered where the record clearly demonstrates that under the totality of the circumstances surrounding Respondent's statement, Respondent's statement was voluntary, knowing and intelligent.

2. Whether the Eleventh Circuit Court of Appeals erred in relying on its own decision in concluding that the state court's decision, that a confession was voluntarily, knowingly and intelligently given is contrary to clearly established federal law.

3. Whether a police officer's opinion that there are "pros" and "cons" to obtaining a lawyer and that "honesty would not hurt," given to a suspect after the suspect had voluntarily, knowingly and intelligently waived his Miranda rights, invalidated that waiver.

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FLORIDA ATTORNEY GENERAL,
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ROBERT ARTHUR HART
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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Hart v. Attorney General for the State of Florida, 323 F.3d 884 (11th Cir. 2003). The opinion of the Third District Court of Appeal of Florida affirming defendant's convictions was filed September 8, 1999, and is reported as Hart v. State, 741 So. 2d 595 (Fla. 3d DCA 1999).

Citations to the circuit court record will conform to those contained in the record before the United States Court of Appeals, Eleventh Circuit and will be indicated by the symbols "DK" reflecting the docket entry number followed by the page number and/or appendix where appropriate. Petitioner's Appendix contains the opinion of the United States Court of Appeals, Eleventh Circuit, as reported in the Federal Reporter, Third Series; the opinion of the Third District Court of Appeal, Florida, as reported in the Southern Reporter, Second Series; excerpt for the order of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

JURISDICTION

The judgment under review was entered on March 5, 2003. Rehearing and rehearing en banc was denied on June 5, 2003. On June 5, 2003, an order was entered granting the Attorney General's motion for a stay of the issuance of the mandate until September 3, 2003, pending the filing of the instant petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this petition involve the Fifth Amendment to the United States Constitution and 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE AND FACTS

On July 20, 1994, defendant Hart and four co-defendant's were charged by grand jury indictment with two counts of first degree murder, armed robbery, burglary with assault or battery therein while armed, the unlawful possession of a firearm while engaged in a criminal offense, and armed kidnaping. Hart v. Attorney General of the State of Florida, 323 F.3d 884, 886 (11th Cir. 2003). The defendants were tried separately. Hart was convicted on all counts by a jury in November 1997.[1] Id. The State's case against Hart consisted primarily of his taped confession, physical evidence which contradicted portions of his confession wherein he denied killing the victims and his

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[1] On January 14, 1998, the trial court entered a judgment notwithstanding the verdict and vacated the armed kidnapping conviction.

fingerprint which was found on the outside door of the burglarized premises. Id.

Prior to trial, Hart filed in the State trial court a motion to suppress his confession. [DK. 6, Ex. A, p. 37-460.][2] In support of that motion, Hart alleged, inter alia, that his confession was involuntary where it was obtained in violation of his "right to counsel and privilege against self-incrimination as guaranteed by the Fifth and Sixth Amendment to the United States Constitution... as interpreted by the United States Supreme Court in Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Davis v. United States, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994). [DK. 6, Ex. A, p. 44] The trial court conducted an evidentiary hearing on Hart's motion to suppress.

The facts adduced at that hearing established that Hart and one co-defendant were identified from photographic lineups by the sole witness and survivor to the armed robbery.[3] Hart v. Attorney General, 323 F.3d at 887. At that time, Hart and that co-defendant were also co-defendants in an open criminal case involving the theft of Hart's grandmother's credit card.[4] The police officer involved in the credit card case made contact with Hart at his grandparents home and eventually transported Hart to the police station on the pretext that he wanted to discuss the credit card case. Id.

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[2] All five co-defendants filed separate motions to suppress. The trial court conducted a single hearing on all of the motions and subsequently entered a single order addressing the respective motions individually.

[3] The witness was not available to testify at Hart's trial.

[4] Hart was seventeen years old and was living with his grandparents. His grandmother was his legal guardian.

At the police station, the officer briefly discussed the credit card case with Hart then informed Hart that Detective Mauer wanted to speak with him. Id. Detective Mauer knew Hart from another investigation in which Hart was the victim. Id. Before asking Hart any questions, Mauer advised Hart of his Miranda rights. He explained each right to Hart, ascertained that Hart understood each right, had Hart initial each right to indicated that he in fact understood the right Id. In the presence of Detective Mauer and Sergeant Perez, Hart signed the Miranda rights waiver form indicating that he understood his rights and that he was willing to talk to the police without the assistance of counsel. Id. at 887-888.

After Hart signed the Miranda rights waiver form, Mauer informed Hart that he was investigating the homicide and wanted to know what he knew about it. Hart denied knowing anything about the homicide. Mauer then told Hart that he had been identified by a witness to the crimes. Id. at 888. At that time, Hart asked to speak with Jodi Schuster; he did not ask for a lawyer or his grandparents.[5] Id. Hart knew Detective Schuster because she worked with juveniles and gangs in his neighbourhood. Id. Detective Mauer did not question Hart after he asked for Schuster. Id. He left Hart alone in the interview room to arrange for Schuster to come to the police station. Id.

Hart explained to Schuster that he asked to speak with her because he considered her a friend and thought that she would tell him the truth. Id. She told him that she had never lied to him in the past and would not lie to him now. Id. However, Schuster lied to Hart by telling him that a video camera recorded the robbery and killings. Id. Schuster explained that she lied about the video camera to ensure that Hart told the truth. Id.

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[5] Hart testified at the hearing that throughout the interviews with Mauer and Schuster he continually asked for a lawyer. The trial court found that this testimony was not credible. Hart v. Attorney General, 323 F.3d at 888 fn 7.

In response to Hart's questions about what kind of trouble he was in and what could happen to him, Schuster told Hart that he was in "the biggest trouble [he] could ever be in," and that he could be sentenced to death if he were tried as an adult, which she believed was very likely. Id. Hart then inquired of Schuster whether she would get an attorney if she were in his place. She told him that she could not answer that question, that he had to make his own decision. Id. She left him alone in the interview room to give him time to think about what he wanted to do. Id.

Schuster returned to the interview room after about five minutes. At that time, Hart said to her, "Let's get started." He then asked her to give him her opinion of the pros and cons of having a lawyer. Id. Detective Schuster told Hart that in her opinion, the pros of having an attorney were "he'll protect your rights. He'll tell you what to answer, what not to answer, and he'll be here for you." She then told him that in her opinion, the con was "I'm going to want to ask you questions and he's going to tell you you can't answer me." Id.

Although Schuster did not re-Mirandize Hart, she told him that whatever he told her she would be obligated to disclose to the prosecutor, the judge, his attorney, and to anyone else involved in the investigation who asked. Id. She denied ever using the word "cooperate" during her conversation with Hart. She also denied telling Hart that giving the statement would help him, she told him "honesty wouldn't hurt him." Id. at 888-889. Id.

Hart gave his first incriminating statement to Schuster after she gave him her opinion of the pros and cons of having a lawyer. Id. at 889. Shortly thereafter Hart gave a second recorded statement to Mauer and Schuster. Id.[6]

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[6] Both statements were introduced into evidence against Hart at trial. Id.

Hart filed in the trial court a post-hearing memorandum in support of his motion to suppress. [DK. 6, Ex. A, p. 47-84] In that memorandum, Hart argued that his waiver of his constitutional rights was invalid and involuntary as he was tricked into the waiver by affirmative police misrepresentation as to the nature and scope of the subject interrogation, that his statements were obtained in violation of his Fifth and Sixth Amendment right to counsel, and that his statements were obtained through the use of threats and direct or implied promises of leniency and benefits. Hart argued, inter alia, that Detective Schuster told him that his cooperation would help his situation and that her testimony that "his cooperation would 'not hurt him'[7] is actually a distinction without a difference." [DK. 6, Ex. A, p. 78]

On March 12, 1996, the state trial court signed an order on the motions to suppress. [DK. 12][8][9] Regarding Hart's motion, the court identified the following three issues to be examined in determining whether to suppress his statements:

> 1. Whether the deceptive means of bringing the defendant in for questioning should nullify compliance with the standards for free and voluntary confessions mandated by Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966)?

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[7] Although in his motion Hart states that Schuster told him that his "cooperation would 'not hurt him'", the record reflects that Schuster testified that she told Hart that "honesty wouldn't hurt him." Hart v. Attorney General, 323 F.3d at 889.

[8] Although the order was signed on March 12, 1996, it was not filed until August 4, 1999.

[9] The trial court issued a single order which separately addressed all five motions .

> 2. What duty do the police owe a juvenile to have a parent present for questioning?
>
> 3. Was there a clear and unequivocal request for counsel?

The court ruled that even if the police used deceptive means to bring Hart to the station, "once he was properly Mirandized and his statement was given freely and voluntarily, it is admissible." The Court rejected Hart's claim that his confession was inadmissible because the police did not notify his grandmother before questioning him. Relying on Davis v. United States, 512 U.S. 452 (1994), the court found that Hart did not make a clear, unambiguous and unequivocal request for counsel. The court found:

> Hart never made such a request in his taped statement. He was advised of his rights to an attorney on the tape and prior to giving any statement. He commented that he knew all about his rights.
>
> Hart's conversation with Detective Schuster weighs the possibility of an attorney but could hardly qualify as an unequivocal demand for counsel.
>
> ...
>
> This Court finds that Hart's statements were freely, voluntarily and intelligently made and his motion to suppress these statements is denied.

[DK. 12, p. 8]

On appeal to the Third District Court of appeal, Hart argued, inter alia, That the trial court erred in denying his motion because "[u]nder the totality of the circumstances, this confession was involuntarily obtained." [DK. 6, Exh. C, p. 22-27]. On September 8, 1999, that court, citing, inter alia, State v. Owens, 696 So. 2d 715 (Fla. 1997) (holding that Davis v. United States, applies in Florida), per curiam affirmed without written opinion Hart's convictions.

Hart subsequently filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the United States District Court for the Southern District of Florid claiming, inter alia, that his confession was involuntarily obtained. [DK. 1] The district court denied the petition but granted Hart a certificate of appealability on the issue of the voluntariness of his confession. [DK. 21]

On appeal, the Eleventh Circuit Court of Appeals granted Hart's petition. The court found that 28 U.S.C. § 2254(d)(1) authorized it to grant the petition because the state courts decision was contrary to clearly established federal law. The court determined that the state courts "did not analyze whether Hart's colloquy with Schuster resulted in a waiver that was not voluntary, knowing, and intelligent." Hart v. Attorney General, 323 F.3d at 892. The court concluded that because the state courts relied only on Davis v. United States, they failed to determine the voluntariness of Hart's waiver of his Miranda rights under the totality of the circumstances as required by Moran v. Burbine, 475 U.S. 412 (1986).

The court then made an independent determination that although the police officers went to "great lengths" to apprise Hart of his Miranda rights, his waiver was not voluntary, knowing, and intelligent because Detective Schuster mislead Hart when she told him "that the disadvantage of having a lawyer present was that the lawyer would tell Hart not to answer incriminating questions" and that "honesty wouldn't hurt him." Hart v. Attorney General, 323

F.3d at 894. The court concluded that because it found that Hart's waiver was not voluntary, knowing, and intelligent, the state court's determination of the issue resulted in a decision that is contrary to clearly established federal law. Id. The court then determined that the admission of Hart's statement was not harmless because without his confession, there was insufficient evidence to establish his guilt. Id. at 895.

District Judge Vinson[10] dissented. Judge Vinson was of the opinion that Schuster's colloquy with Hart did not nullify Hart's prior waiver of his rights. Judge Vinson noted that Hart had been properly advised of his rights and voluntarily waived his rights before his conversation with Schuster. He interpreted Schuster's comment as merely advising Hart to tell the truth, and not to trick him into confessing as the majority believed. Id. at 897. Judge Vinson noted further that the record simply did not support the majority's finding that the trial court did consider the impact of Schuster's conversation with Hart in ruling on the validity of Hart's waiver. Id. at 898.

Judge Vinson also disagreed with the majority's opinion that there is clearly established federal law from the Supreme Court governing the issue. He identified the issue as "What post-waiver statements amount to retroactive nullification of a prior valid Miranda waiver, if that is even possible, has not been clearly established by the Supreme Court." Id. at 899. He noted that the Supreme Court has in fact declined to consider whether affirmative post-Miranda waiver misrepresentations by police nullified the waiver. Id. at 900.

Judge Vinson also disagreed with the majority that the state court's decision was contrary to clearly established Supreme Court precedent. He found that the record established that the state court

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[10] Judge Vinson was sitting by designation.

in fact considered all of the circumstances surrounding Hart's statement. He noted that the trial court heard all of the evidence presented at the suppression hearing and made numerous findings in evaluating the circumstances surrounding the confession. Id. at 902-903.

The court denied the Attorney General's motion for rehearing and rehearing en banc on June 5, 2003. The court subsequently granted the Attorney General's motion to stay issuance of the mandate until September 3, 2003, pending the filing of the instant petition.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW, IN GRANTING HABEAS CORPUS RELIEF UNDER 28 U.S.C. § 2254(d), MISCONSTRUED THE "CONTRARY TO" CLAUSE OF THAT STATUTORY PROVISION, BY (A) REJECTING A STATE COURT'S DETERMINATION OF VOLUNTARINESS OF A CONFESSION DUE TO THE FAILURE OF THE STATE COURT TO ENUMERATE ALL OF THE FACTORS WHICH IT CONSIDERED; AND (B) CONSIDERING ITS OWN PRIOR DECISION AS EVIDENCE OF "CLEARLY ESTABLISHED FEDERAL LAW"; AND (C) FINDING THAT CONDUCT OCCURRING SUBSEQUENT TO A WAIVER OF MIRANDA RIGHTS VITIATED THE PRIOR KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THOSE RIGHTS.

A. The court below applied the "contrary to" prong of 28 U.S.C. § 2254(d)(1), as explained in Williams v. Taylor, erroneously when it found that a state court's decision that a confession was voluntarily, knowingly, and intelligently given is contrary to clearly established federal law because the state court did not enumerate all of the factors it considered.

Habeas corpus relief may be granted, under 28 U.S.C. § 2254(d), only if the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Elaborating upon that statutory provision, this Court stated, in Williams v. Taylor, 529 U.S. 362, 405-407 (2000), that a decision by a state court is

"contrary to" this Court's clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." See also Price v. Vincent, 123 S.Ct. 1848 (2003).

The lower court, in applying the "contrary to" prong of § 2254(d)(1), found that it had been satisfied because the state courts did not "determine whether, under the totality of the circumstances, Hart's waiver was voluntary, knowing, and intelligent." Hart v. Attorney General, 323 F.3d at 893. Rather, the state courts "only applied Davis [v. United States, 512 U.S. 452 (1994)], which is inapplicable to the issue of the voluntariness of a Miranda waiver. By only applying Davis when the circumstances also required the state courts to apply Moran's totality of the circumstances inquiry to the issue of whether the waiver was voluntary, they failed to identify the 'correct legal rule,' and their decision were thus contrary to established law, as determined by the Supreme Court." Id.

The essence of the lower court's reasoning is that a state court acts contrary to established Supreme Court precedent regarding the voluntariness of a confession if the state court does not enumerate all of the facts upon which it relies. Only then is the state court's determination safe from attack in federal habeas corpus proceedings, as only then can the state courts demonstrate that they did, in fact, consider the totality of the circumstances.

Such reasoning, however, is contrary to the decisions of this Court and other federal appellate courts which have expressly held that state courts are not obligated to enumerate the reasons upon which they found a confession to be voluntary. For example, in Sims v. Georgia, 385 U.S. 538, 544 (1967), this court held that a trial court "need not make formal findings of fact or write an opinion," as long as the judge's "conclusion that the confession is

voluntary" appears "from the record with unmistakable clarity." A simple finding of voluntariness, coupled with the lack of coercion, was deemed sufficient in United States ex rel. Placek v. Illinois, 546 F. 2d 1298, 1306 (7th Cir. 1976). Similarly, the absence of an express finding "as to whether the police officers promised leniency or medical treatment" did not undermine the state trial court's determination that a confession was voluntary in Woods v. Armontrout, 787 F. 2d 310, 315 (8th Cir. 1986). Cf. Wright v. Sec. Dep't of Corr., 278 F.3d 1245 (11th Cir. 2002)(explaining the difference between a "decision" and an "opinion" and holding that under § 2254(d), a state's summary, unexplicated rejection of a federal claim is entitled to deference).

The only way to satisfy the apparent requirements of the court below would be for the state court to enumerate all of the factors that it considered in ruling on the voluntariness of the confession. Failing that, any state court determination of voluntariness would appear to be subject to de novo review in federal habeas corpus proceedings - and that would be contrary to the intent of AEDPA and this Court's pronouncements in Williams v. Taylor.

Moreover, although the state trial court's decision focused substantially on the question presented under Davis v. United States, the court's ultimate ruling unmistakably considered the totality of the circumstances. Not only did the court find that "Hart's statements were freely, voluntarily and intelligently made," [DK. 12, p. 8], but, the trial court, in enumerating the several questions to be examined, expressly contemplated the standards for voluntary confessions mandated by Miranda v. Arizona. Id. The trial court further recognized that a statement is admissible only if it "was given freely and voluntarily." [DK. 12, p. 5].

The court below concluded that the state court did not consider Hart's claim under the totality of the circumstances because it did not cite Moran v. Burbine, 475 U.S. 412 (1986).

Clearly, that the court did not cite Moran is no evidence that its decision in rejecting Hart's claim is contrary to the holding in that case. See Early v. Packer, 123 S.Ct. 362, 365 (2003)(state court need not cite to, or even be aware of, controlling federal cases "so long as neither the reasoning nor the result of the state-court decision contradicts them."). Had the court not considered the voluntariness of the waiver under the totality of the circumstances, it would not have made a finding that the statements were "freely, voluntarily and intelligently made."

Further, as Judge Vinson noted, the record is replete with evidence that the state courts in fact evaluated Hart's claim under the totality of the circumstances. Hart v. Attorney General, 323 F.3d at 898, Vinson, J. (dissenting). In Woodford v. Visciotti, 537 U.S. 19 (2002), this Court reversed the Ninth Circuit Court of Appeals grant of § 2254 relief where the Ninth Circuit found that the state court's decision was contrary to clearly established law. The Ninth Circuit found that the state court applied an incorrect standard in evaluating the defendant's ineffective assistance of counsel claim. Id. at 285. This Court found that the record did not support the Ninth Circuit's finding. Id. at 286. In reversing the Ninth Circuit, this Court noted that the court's readiness to find error in the state court was "inconsistent with the presumption that state courts know and follow the law,"[11] and was also incompatible with the "highly differential" standard for assessing state court decisions. Id. In the instant case, the lower court afforded no deference to the state courts adjudication of Hart's claim when it concluded that the state courts did not consider Hart's waiver under the totality of the circumstances.

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[11] The Third District Court of Appeal is aware of and follows Moran v. Burbine. See e.g., State v. Manning, 506 So. 2d 1094 (Fla. 3d DCA 1987).

B. The court below erred when it determined de novo, that Hart's waiver was not voluntary, knowing and intelligent.

Having determined that the state courts did not evaluate Harts waiver of his constitutional rights under the totality of the circumstances, the court below undertook its own evaluation of the totality of circumstances and concluded that Hart's waiver was the product of deception. This was error. In Price v. Vincent, 123 S.Ct. 1848 (2003), this Court reversed a federal court of appeals order granting a 28 U.S.C. 2254 petition where the appeals court conducted a de novo review of the petitioner's claim. This Court found that the appeals court erred when it concluded that the petitioner's claim presented a question of law that was reviewable de novo despite the fact that the state court rejected the merits of the claim. This Court held that the appeals court should have evaluated the claim "through the lens of § 2254(d)." Id. at 1852, 155 L.Ed 2d at 885. See also Williams v. Taylor, 529 U.S. 362 (2000) (explaining the difference between the pre-AEDPA de novo standard of review and post-AEDPA).

C. The court below applied the "contrary to" prong of 28 U.S.C. § 2254(d)(1), as explained in Williams v. Taylor, erroneously by relying on its own prior decision as evidence of the "clearly established law."

As noted above, this Court, in Williams v. Taylor, held that a state court decision is "contrary to" the clearly established law of this Court if it "applies a rule that contradicts the governing law set forth in our cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." 529 U.S. at 405-406.

A primary basis of the lower court's conclusion that the state court decision was "contrary to" established law of this Court was the lower court's own prior decision, in United States v. Beale, 921 F. 2d 1412 (11th Cir. 1991). The lower court proceeded to compare the facts of the two cases, and then concluded that it saw "no significant difference between the facts presented in Beale and the facts presented in the instant case." Hart v. Attorney General, 323 F.3d at 894-895. Thus, since the confession at issue in Beale was not voluntary, the confession at issue in the instant case was not voluntary.

In an effort to prove that the court was not relying on its own precedent to announce clearly established federal law, as determined by this Court, the lower court opined that it relied on Beale solely "as an illustration of clearly established federal law applied to similar facts." Id. at 894. n. 20. That, however, is a distinction without substance. The reasoning of the court is essentially as follows: (1) the Supreme Court has mandated that all confession be determined to be voluntary based on the totality of the circumstances; (2) the facts of Beale demonstrate that the confessions in both Beale and the instant case are not voluntary; (3) Beale therefore demonstrates what clearly established federal law is.

Other federal appellate courts have clearly recognized that this Court's decisions are the only ones relevant to the determination of whether a state court decision is contrary to clearly established federal law. For example, the Sixth Circuit, in Amunga v. Jones, 51 Fed. Appx. 532, 2002 U.S.App. LEXIS 22184 (6th Cir. 2002), held: "In reviewing a state court decision under AEDPA, we must look only to the Supreme Court holdings that existed at the time of the state court's decision. Id. at 412. We may not base our decision on Supreme Court dicta or the decisions of the courts of appeals." Indeed, the Eleventh Circuit itself has acknowledged that lower federal court decisions do not constitute clearly established federal law. See Hall v. Head, 310 F.3d 683

(11th Cir. 2002) (lower federal court's decisions do not constitute clearly established federal law under § 2254(d)). Less explicitly, other federal courts, making voluntariness determinations in the aftermath of Williams v. Taylor, have applied the "contrary to" prong by referring solely to precedents from this Court. See, e.g.,Smith v. Bowersox, 311 F.3d 915 (8th Cir. 2002).

D. The court below erred in finding that allegedly coercive conduct occurring subsequent to a waiver of Miranda rights vitiates the prior waiver, and that finding conflicts with decisions from other Circuit Courts of Appeals.

The lower court's use of post-waiver conduct as a basis for vitiating the prior waiver conflicts with the decisions of other federal appellate courts. For example, in Mueller v. Angelone, 181 F. 3d 557 (4th Cir. 1999), after the initial waiver of Miranda rights, and during the interrogation by a police officer, the defendant queried whether the officer believed the defendant needed an attorney present. 181 F. 3d at 573. The officer responded by "shaking his head slightly from side to side, moving his arms and hands in a 'shrug-like manner,' and stating, 'You're just talking to us.'" Id. at 573-74. The Fourth Circuit concluded that this colloquy did not invalidate the prior waiver. Id. at 575.

More recently, the Fifth Circuit, en banc, concluded that conduct occurring subsequent to the Miranda rights waiver did not vitiate the waiver. Soffar v. Cockrell, 300 F. 3d 588 (5th Cir. 2002) (en banc). After Soffar waived his Miranda rights, Soffar queried whether he should talk to the police or get an attorney. Officer Clawson responded that "'if he was involved in the crime he should tell the detective he was in it; otherwise he should get a lawyer.'" 300 F. 3d at 591. When Soffar asked how he could get an attorney, the officer asked if he could afford one, knowing that Soffar could not. When Soffar followed that with questions regarding the appointment of court-appointed counsel, the officer

responded that he did not know local procedures and guessed that it could take between one day and one month. Id. Soffar then gave three written statements confessing to multiple murders. In response to Soffar's claim that "Clawson's misleading statements invalidated the multiple waivers Soffar had given *prior* to the interview," 300 F. 3d at 596, the en banc court "conclude[d] they do not." Id. The court further noted that it had previously rejected, "in a case involving very similar facts, an argument of retroactive waiver based on misleading statements." 300 F. 3d at 596, citing De La Rosa v. Texas, 743 F. 2d 299 (5th Cir. 1984).

The opinion of the court below does not, in any way, assert that the original waiver of Miranda rights was involuntary, or that Hart did not understand his rights when he initially waived them and decided to speak to the police. Under such circumstances, the decision of the court below conflicts with decisions of the Fourth and Fifth Circuits, as the lower court's determination of involuntariness is predicated solely on an act occurring subsequent to the initial knowing, voluntary and intelligent waiver of rights.

E. The court below erroneously concluded that Hart's statements were involuntary.

In the decision below, the court identified Moran v. Burbine, 475 U.S. 412 (1986), as the settled federal law for evaluating the validity of a waiver of constitutional rights. Hart v. Attorney General, 323 F.3d at 892. Moran v. Burbine, holds that the inquiry into the validity of the waiver of constitutional rights has two distinct dimensions:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or

> deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Id., at 421 (quoting Fare v. Michael C., 442 U.S. 707 (1979).

The Eleventh Circuit concluded that the state court's decision was contrary to Moran because it did not evaluate Hart's waiver under the totality of the circumstances. The court then examined the totality of the circumstances, "as the state courts should have done," and found that Hart's waiver was not voluntary, knowing and intelligent. The court found that although the police went to "great lengths" to apprise Hart of his Miranda rights and although Hart signed the rights waiver form, his confession was not voluntary, knowing and intelligent because Detective Schuster told him that "honesty wouldn't hurt him" and that the "con" of obtaining an attorney was that the attorney would tell Hart not to answer incriminating questions.

The decision below, that Schuster's colloquy with Hart rendered his waiver involuntary, is contrary to Moran and conflicts with decisions of other courts, state and federal, and within the Eleventh Circuit.

The court's finding that Schuster's statement that "honesty wouldn't hurt him" deceived Hart into confessing takes Schuster's statement out of context. Hart's theory at the evidentiary hearing

was that the police obtained his confession through the use of, inter alia, implied promises of leniency and benefits. [DK. 6, Ex. A, p. 47-84]. During cross-examination, Detective Schuster denied that she used the word "cooperate" during her conversation with Hart. She also denied telling Hart that the statement would help him, she testified that she told him "honesty wouldn't hurt him." Hart v. Attorney General, 323 F.3d at 88-889. In his post hearing memorandum Hart argued that Schuster told him that his cooperation would help his situation and that her testimony that "his cooperation would 'not hurt him' is actually a distinction without a difference." [DK. 6, Ex. A, p. 78]. Clearly, the statement was not presented in state court as a discrete basis for finding Hart's waiver invalid; it was elicited in response to Hart's claim that the officer promised him that his cooperation would help his situation. The lower court's focus on that statement in finding Hart's waiver invalid is clearly contrary to Moran since it did not consider that statement in the context of the entire interrogation.

Moreover, that statement did not render Hart's waiver invalid. In Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985, modified on other grounds, 781 F.2d 185 (11th Cir.), cert. den., 479 U.S. 909 (1986), the Eleventh Circuit found a confession voluntary on facts similar to the facts of the instant case. In that case, as in the instant case, there was no dispute that the defendant was advised of and waived his Miranda rights prior to the start of the interrogation. Id. at 922. The defendant claimed, inter alia, that his confession was involuntary because it was obtained through coercive means. The defendant relied upon the following facts as the evidence of coercion:

> the police admitted to employing a "good guy bad guy" technique; during the early stages of the interrogation, Detective Anderson, playing the "bad guy," raised his

> voice at Martin, cursed him, and discussed the death penalty, while Detective Glover and Assistant State's Attorney Jack Scarola, as the "good guys," expressed sympathy for Martin. According to Martin, Anderson also misrepresented the strength of the state's case against him by telling him that codefendant Gary Forbes had confessed, while Scarola promised that an attempt would be made to obtain psychiatric help for him, told him that the truth "couldn't hurt him," and gave him legal advice concerning the possible effect of a confession.

Id. at 925. The Eleventh Circuit in that case agreed with the state trial court, that although certain of the police tactics were "distasteful," under the totality of the circumstances, individually or cumulatively, such tactics were not so coercive as to overbear the defendant's will. Id. at 926. See also, Martin v. United States, 166 F.2d 76 (4th Cir. 1948)(advising defendant that "it was wiser to tell the truth" did not render confession involuntary where defendant had been warned of his rights), United States v. Barfield, 507 F.2d 53 (5th Cir. 1975)(telling defendant that "(1) it would be in his 'best interest' to tell the 'real story' and (2) that telling a lie might result in his being left 'holding the bag,'" did not render confession inadmissible), Amaya-Ruiz v. Stewart, 121 F.3d 486 (9th Cir. 1997)(encouraging defendant to "tell the truth" did not amount to coercion), Quick v. State, 599 P.2d 712 (Alaska 1979)(telling juvenile "the truth would 'help him' and not 'hurt him'" while administering rights did not render waiver invalid), Cansler v. State, 409 S.E. 2d 504 (Ga. 1991)(confession obtained after police told defendant "truth could not hurt him" was

voluntary), Reems v. State, 127 Md. 624; 96 A. 878 (Md. 1916) (officer asking defendant "why he didn't tell the truth," and "truth would hurt no one" did not amount to improper influence to render confession inadmissible), Merchant v. State, 217 Md. 61; 141 A.2d 487 (Md. 1958)(officer's reply that "the truth hurts no one," did not render confession inadmissible particularly where defendant was told that any statement would be used against him).

In the case sub judice, the police went to "great lengths" to apprise Hart of his rights. Hart signed the waiver form indicating that he understood his rights and that he was willing to talk with the police without counsel. Hart v. Attorney General, 323 F.3d at 93. Hart admitted that he knew all about his rights from his prior case. Schuster did not talk with Hart until after Hart signed the waiver form. The trial court made specific findings that "Hart was alert, that he had slept six to seven hours the night before and that he was able to understand what was explained to him." Id. at 896 (Vinson, J. dissenting). Under the totality of these circumstances, Hart's waiver was voluntary, knowing and intelligent. The state court's decision is therefore not contrary to Moran v. Burbine.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,
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CASE NO. 03-__

IN THE UNITED STATES SUPREME COURT

October Term 2003

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT ARTHUR HART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Amend. V, U.S. Const. A-51

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15571

D.C. Docket No. 00-04200CV-ASG

ROBERT ARTHUR HART,

Petitioner-Appellant,

versus

ATTORNEY GENERAL FOR THE STATE OF FLORIDA,
SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 5, 2003)

Before TJOFLAT and KRAVITCH, Circuit Judges, and VINSON*, District Judge.

TJOFLAT, Circuit Judge:

I.

A.

On July 20, 1994, Robert Hart, the appellant; James Leonard, III; Jyri Quinland; Nelson Vargas; and Jason Monte-Perini were indicted by a Dade County, Florida, grand jury following the July 3, 1994 armed robbery of Elite Photography Studio ("Elite")--a private club in North Miami Beach where customers paid to watch and photograph models in various states of undress-- which led to the deaths of Todd Klein and Yohanna Fleites, Elite's manager and one of its models, respectively. Each defendant was charged with two counts of first degree murder, armed robbery, burglary with assault or battery therein while armed, and unlawful possession of a firearm while engaged in a criminal offense. The defendants were also charged with the armed kidnaping of Aneschka Culmer, another model at Elite, who was the only witness and survivor of the armed robbery.[1]

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* Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

[1] Leonard, Quinland, and Monte-Perini were charged with an additional count of armed robbery against Culmer. Leonard and Quinland were also charged with tampering with a witness for threatening Culmer to prevent her from communicating to law enforcement what she had witnessed at Elite.

The defendants were tried separately in the Dade County Circuit Court.[2] Following a jury trial in November 1997,[3] Hart was convicted on all counts.[4] Hart's conviction was based primarily on a taped statement given to police in which he confessed to participating in the robbery, and physical evidence which discredited the portion of Hart's statement in which he denied killing Klein and Fleites. The only other evidence presented by the prosecution which linked Hart to these crimes was Hart's fingerprint which had been found on the outside of the door to Elite. Culmer, the only eyewitness, was not available to testify at Hart's trial, and Hart's co-conspirators were not called as witnesses. Prior to trial, Hart moved to suppress his statements because they were not given voluntarily as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The circuit court conducted an evidentiary hearing on Hart's motion to suppress.[5]

The suppression hearing revealed that the Metro-Dade police learned of Hart's involvement in the robbery at Elite after talking to Culmer. Culmer provided them with a description of each of the five participants, names she overheard, and a

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[2] The district court order denying Hart's habeas petition indicates that the other defendants were convicted, but the record before us does not indicate when they were convicted or on what charges.

[3] Hart was first tried in September 1997, but the court declared a mistrial.

[4] On January 14, 1998, the circuit court found Hart not guilty of armed kidnaping notwithstanding the jury verdict, and entered an order vacating his conviction with respect to that charge.

[5] Hart's co-defendants also filed motions to suppress statements and other evidence. The circuit court conducted a single hearing on all of the motions.

description of the truck they were driving. She also told the officers that one of the participants, whom the others referred to as "Rolex," said that his wife used to work as a model at Elite. Acting on this information, the police found an employment application in Elite's files which was filled out by a woman who listed "Rolex" as her last name. Detectives matched the address on this employment application to the residence of Leonard. The police connected Hart to Leonard because they had recently been arrested together for stealing Hart's grandparents' credit cards. Culmer identified Leonard and Hart as participants in the robbery and homicides from photographic lineups.

B.

Hart was the first suspect to be brought in for questioning. Detective Hill testified that he was chosen to bring Hart in for questioning on July 4 because he already knew Hart from his investigation of the credit card case. Hill called Hart's grandparents' house, where Hart lived,[6] to confirm that he was home, and explained to Hart's grandmother that he wanted to bring Hart to the police station to talk about the credit card case, which was still pending. He then drove to the grandparents' house and asked Hart to accompany him to the police station to talk about the credit card case, which Hart agreed to do. Hill did not tell Hart or his grandparents about the homicide investigation.

Hill testified that, after arriving at the police station, he and Hart discussed the credit card case for five to ten minutes. Hill told Hart that he had to stay out of trouble because Hill was going to talk to the state attorney about getting Hart into a diversion program or probation in lieu of jail time for the credit card theft. As he was leaving the room, Hill told Hart that Detective Mauer wanted to speak to him about another case, but he did not tell Hart

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[6] Hart was only seventeen at the time, and his grandmother was his legal guardian.

what the nature of the other case was. Hill did not tell Hart that he was free to leave.

Detective Mauer also knew Hart from a previous investigation (a sexual abuse case in which Hart was the victim). Mauer testified that before asking Hart any questions, he had Hart sign a Miranda rights waiver form. Mauer testified that he explained to Hart one by one each right listed on the form: (1) that he had the right to remain silent; (2) that anything he said could be introduced into evidence against him in court; (3) that he had the right to have an attorney to represent him at any time during questioning; and (4) that if he wanted an attorney but could not afford one, one would be provided without charge. After Mauer explained each right, Hart put his initials next to "yes" to indicate that he understood the right. Mauer then directed Hart's attention to a question on the form asking whether he was willing to answer questions at this time without the presence of an attorney; he explained that Hart could put his initials next to "yes" if he was willing to answer questions, and Hart did so. Mauer then asked Hart to sign at the bottom of the form beside a statement indicating that he signed the form of his own free will without any threats or promises having been made to him. Mauer brought Sergeant Perez into the interview room to witness Hart's signature on the waiver form.

Mauer testified that after Hart signed the Miranda rights waiver form, he told Hart that he was investigating a homicide that occurred at a photo place, and he wanted to find out what Hart knew about it. Hart said that he knew nothing about it. Mauer then told Hart that a witness had identified him from a photographic lineup. Hart then asked to speak to Jodi Schuster, a detective whom Hart knew because she worked with juveniles and gangs in his neighborhood. Mauer testified that Hart did not ask to speak to

a lawyer[7] or to his grandparents.[8] After Hart requested to speak to Schuster, Mauer stopped questioning him and left the interview room to arrange for Schuster to come to the police station to talk to Hart.

Schuster testified that when she arrived, Hart told her that he asked to speak to her because he thought of her as a friend. He told her that he thought she would tell him the truth, and she told him that she had never lied to him in the past, and she would not lie to him now. In fact, she did lie to him about there being a video camera at Elite that had recorded the robbery and the killings. She testified that her purpose in lying about the video camera was to ensure that Hart told her the truth.

Hart asked her if he was in big trouble, and she answered that he was in "the biggest trouble [he] could ever be in."[9] Hart asked what could happen to him, and she told him that he could be given the death penalty if he were tried as an adult, which she believed was very likely. Hart asked Schuster whether she would get an attorney if she were in his shoes, and she told him that she could not answer that question, that he had to make his own decision. She told him to think about what he wanted to do and left

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[7] Hart testified that he did ask Mauer for a lawyer, but Mauer ignored his request, so he asked for Schuster because he trusted her. He testified that he also told Schuster several times that he wanted a lawyer, but Schuster also ignored his requests, and he confessed because he felt he had no alternative after his requests for a lawyer were denied. The circuit court found that Hart's testimony that he made several requests for a lawyer was not credible.

[8] Hart's grandmother arrived at the police station while Hart was talking to Schuster. Mauer explained to her that Hart was being interviewed about a murder case. No one informed Hart that his grandmother was at the police station until after he gave a statement.

[9] Schuster's quotations are taken from her testimony at the suppression hearing.

the room for approximately five minutes to give him time to think about it.

Schuster testified that when she came back to the room, Hart said, "Let's get started." Hart then asked her what the pros and cons of having an attorney were in her opinion. She said that in her opinion the pros of having an attorney were "He'll protect your rights. He'll tell you what to answer, what not to answer, and he'll be here for you." She told him the con in her opinion was "I'm going to want to ask you questions and he's going to tell you you can't answer me."

Schuster did not re-Mirandize Hart. She testified that she did not indicate to Hart that she would keep what he said to *889 her confidential. She told him that whatever he told her she was obligated to repeat to the prosecutor, the judge, his attorney, and anyone else involved in the investigation who asked. She testified that she did not use the word "cooperate" and never told Hart that giving a statement would help his present situation, but she also testified that she told him "honesty wouldn't hurt him." She did not tell Hart that he was free to leave because she did not believe he was.

Schuster testified that after she told Hart her opinion of the pros and cons of having a lawyer, Hart again said, "Let's get started." Hart then gave an incriminating statement to Schuster. He repeated this statement a few minutes later with both Schuster and Mauer in the room. This second statement was recorded. At Hart's trial, Schuster testified to the contents of Hart's initial statement (which she called a "pre-interview"), and the taped statement was played for the jury.

C.

In his taped statement, Hart said that it was Leonard's idea to go to Elite on July 3, 1994 to watch models undress. Leonard told Hart to get his grandmother's credit cards so they could pay for this activity. When they arrived at Elite, Todd Klein told them that Elite did not accept their credit cards. Leonard told Klein they

would go to an ATM to get money and come back. Hart said that after they left Elite, Leonard suggested that they go back and rob the place. Hart, Quinland, and Vargas were opposed to this idea at first, but Leonard convinced them to do it. Hart said that he was supposed to stay in the truck while the others went in, but when they arrived at Elite, Leonard made everyone go inside.

The group had two firearms. Leonard was carrying one which Hart said did not work, and Monte-Perini was carrying the other--a .22 caliber rifle. Once they were inside, Monte-Perini gave the rifle to Hart. Leonard pointed his firearm at Klein's head and told him this was a robbery. Leonard told Hart to watch Klein, Fleites, and Culmer with the rifle in one room while the others looked around the rest of the club for things to steal. Quinland took Culmer out of the room to talk to her when she implored them not to hurt her because she had a young child. After searching for things to steal, Leonard came back in the room and took Fleites down the hall, leaving Hart alone with Klein. Hart believed that Leonard took Fleites down the hall to rape her.

When Leonard brought Fleites back into the room a few minutes later, he threatened to kill Hart if he did not kill Klein. At this point, Leonard and Hart were the only participants still in the club. Leonard put a pillow over Klein's head. Hart said that he fired into the pillow, but deliberately missed Klein. Hart said that after Leonard discovered that Klein was still alive, Leonard shot and killed both Klein and Fleites.

Leonard and Hart then exited the club and joined the others outside. Leonard wanted to kill Culmer too, but Quinland would not let him. They drove to Leonard's house, taking Culmer and the items they stole with them. Once they were at Leonard's house, they brought the items they stole inside, and Leonard left to drive Culmer home.

After completing his account of the robbery and homicides, Hart gave names and descriptions of Leonard, Quinland, Vargas, and Monte-Perini. Schuster asked Hart if he had given the taped

statement voluntarily, and he answered "yes." She asked if anyone had threatened or coerced him to make the statement, and he answered "no." She asked if anyone had made any promises or offered a reward to make the statement, and he said "no." This concluded the taped statement.

On March 12, 1996,[10] the circuit court, relying on Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), denied Hart's motion to suppress because it concluded that his colloquy with Schuster was not an unequivocal request for an attorney.[11] In a per curiam decision filed September 8, 1999, the Florida Third District Court of Appeal affirmed without written opinion, citing as support for its affirmance State v. Owen, 696 So.2d 715 (Fla.1997),[12] which held based on Davis that "police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or

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[10] For some reason, however, the circuit court's order was not recorded until August 4, 1999. Although the order did not appear in the index of proceedings which was furnished as part of the appellate record, the Florida Third District Court of Appeal did have before it transcripts of the suppression hearing when it reviewed Hart's conviction.

[11] The circuit court also concluded that the deceptive means used by police to bring Hart to the police station for questioning did not nullify compliance with the Miranda standards, that the police did not violate Hart's rights by questioning him without his grandmother, and that the police were not obligated to contact Hart's attorney from the credit card case before questioning him. These findings are not pertinent to the determination of whether the conduct of the police during the interrogation--particularly Schuster's colloquy with Hart on the pros and cons of hiring a lawyer--resulted in an involuntary waiver.

[12] The Third District Court of Appeal also cited Adams v. State, 412 So.2d 850 (Fla.1982), and Dell v. State, 661 So.2d 1305 (Fla.3d Dist.Ct.App.1995), to support its affirmance, but these cases involved the denial of jury instruction requests, and are thus irrelevant to the issue of the voluntariness of Hart's Miranda waiver.

ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights." Owen, 696 So.2d at 719. It therefore appears that the Third District Court of Appeal affirmed the denial of Hart's motion to suppress based solely on its agreement with the circuit court that Hart's colloquy with Schuster did not amount to an unequivocal request for an attorney.

On November 3, 2000, Hart, who is now in the custody of the State of Florida under a sentence of life imprisonment, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida claiming that he is being held in custody in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[13] The district court denied Hart's petition, but granted a certificate of appealability on the issue of whether Hart's privilege against self incrimination[14] under the Fifth and Fourteenth Amendments was violated when the police misled him as to the nature of that right. We now grant Hart's petition for writ of habeas corpus.

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[13] 28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[14] The privilege against self incrimination is spelled out in the Fifth Amendment, which provides, in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself...." U.S. Const. amend. V.

II.

A.

28 U.S.C. § 2254(d)(1) authorizes a federal court to grant a petition for writ of habeas corpus with respect to a claim that was adjudicated on the merits in state court where the adjudication in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[15] "Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 404, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). We conclude that, in the instant case, habeas relief is appropriate because the state court decision was contrary to clearly established federal law, as determined by the Supreme Court.

Writing for the Court with respect to Part II in Williams, Justice O'Connor explained that a state-court decision will be contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." Williams, 529 U.S. at 405-406, 120 S.Ct. at 1519-1520. Hart argues that the decision of the state courts is contrary to clearly established federal law, as determined by the Supreme Court, because the trial judge failed to determine whether his Miranda waiver was voluntary, knowing, and intelligent under

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[15] A federal court is also authorized to grant a petition for writ of habeas corpus where the adjudication on the merits in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Because we conclude that the state court's decision on the suppression issue was contrary to clearly established federal law, we need not address whether the decision was based on an unreasonable determination of facts.

the totality of the circumstances. As noted supra, both the state trial court and the state appellate court determined that Hart's colloquy with Schuster was not an unequivocal request for counsel under Davis. Neither court, however, analyzed whether Hart's colloquy with Schuster resulted in a waiver that was not voluntary, knowing, and intelligent.

Justice O'Connor determined that the statutory phrase "clearly established federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412, 120 S.Ct. at 1523. Justice O'Connor went on to explain that "[w]ith one caveat, whatever would qualify as an old rule under [the Supreme Court's] *Teague* jurisprudence will constitute 'clearly established federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). The one caveat ... is that § 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Id. (internal citation omitted).

The Supreme Court has held--and it is therefore clearly established--that the government cannot introduce a suspect's statement taken without the presence of an attorney without first showing that the suspect made a voluntary, knowing, and intelligent waiver of his right to counsel. Miranda, 384 U.S. at 475, 86 S.Ct. at 1628 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."). See also United States v. Beale, 921 F.2d 1412, 1434 (11th Cir.1991) ("Before the government may introduce a suspect's uncounselled statement made during custodial interrogation, it must show that the suspect made a voluntary, knowing and intelligent waiver of his privilege against self- incrimination and his right to counsel.").

Likewise, it is clearly established from holdings of the Supreme Court that the inquiry into whether a waiver was voluntary, knowing, and intelligent is twofold:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) (quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)).

Hart argued in both the state trial court and the state appellate court that his waiver was not voluntary, knowing, and intelligent because Schuster misled him as to the nature of the rights he was waiving. Clearly established federal law,[16] as

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[16] Judge Vinson argues in his dissent that granting the writ of habeas corpus is improper in this case because he believes that Supreme Court precedent is not clearly established on this issue. He contends that "[w]hat post-waiver statements amount to retroactive nullification of a prior valid waiver, if that is even possible, has not been clearly established by the Supreme Court." This difference in opinion results from our different understandings of both the phrase "clearly established" and the phrase "totality of the circumstances surrounding the interrogation." Judge Vinson appears to believe that federal law would only be clearly established on this issue if the Supreme Court had decided a case that is "on all fours" with the instant case--a case in which a suspect is advised of his rights, signs a waiver, later asks questions about hiring a lawyer, is deceived by the police, then confesses. We believe that in areas of the law, such as voluntariness of confessions, in which general principles announced by

determined by the Supreme Court, required the state courts to determine whether, under the totality of the circumstances, Hart's waiver was voluntary, knowing, and intelligent. The state courts did not do so. Instead, they only applied Davis, which is inapplicable to the issue of the voluntariness of a Miranda waiver. By only applying Davis when the circumstances also required the state courts to apply Moran's totality of the circumstances inquiry to the issue of whether the waiver was voluntary, they failed to identify the "correct legal rule," and their decisions were thus contrary to clearly established law, as determined by the Supreme Court. Fugate v. Head, 261 F.3d 1206, 1216 (11th Cir.2001).

We now examine the totality of the circumstances, as the state courts should have done, and conclude that Hart's waiver

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the Supreme Court will out of necessity be applied to varying factual situations on a case by case basis, it is acceptable to derive clearly established federal law from these general principles rather than waiting for bright line rules. See Williams, 529 U.S. at 382, 120 S.Ct. at 1507 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) ("[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright line rule.") and Wright v. West, 505 U.S. 277, 308-309, 112 S.Ct. 2482, 2499, 120 L.Ed.2d 225 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."). Applying the general principle that waivers must not be the product of deception and must be fully informed to the facts of this case does not create a new rule; therefore, the law on this issue is clearly established.

Also, as noted infra, the dissent asserts that the waiver inquiry ends with the signing of the waiver form. Influenced by this belief, the dissent characterizes the clearly established federal law we rely on as "retroactive nullification of a prior valid Miranda waiver." This is not the case. Because Moran requires us to examine the totality of the circumstances surrounding the interrogation, we examine the entire interrogation for evidence of involuntariness, and the signed waiver is only one piece of that evidence.

was, in fact, the product of deception and was not "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran, 475 U.S. at 421, 106 S.Ct. at 1141. In this case, Detective Mauer went to great lengths to apprise Hart of his rights. He testified that he went over the Miranda rights waiver form with Hart and carefully explained each Miranda warning to Hart, including that anything he said could be used against him in court. Mauer testified that Hart signed the form to indicate that he understood each right and that he was willing to answer questions without a lawyer. Although a signed Miranda waiver form is "usually strong proof" that a suspect voluntarily waived his rights, it is not conclusive on this issue. North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably ... sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."). See also Blasingame v. Estelle, 604 F.2d 893, 896 (5th Cir.1979)[17] ("Defendant's signing of the waiver form, though not conclusive, is 'usually strong proof' of the voluntariness of the waiver.") (emphasis added). Our analysis cannot end with Hart's signing of the waiver form because we are required to examine the "totality of the circumstances surrounding the interrogation" to determine whether Hart's decision to waive his rights was made voluntarily, knowingly, and intelligently.[18]

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[17] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[18] The dissent believes that we assume "that Schuster's statement was made while still in the Miranda waiver process." We find no support for a distinction between the Miranda waiver process and the interrogation process. Such a distinction fails to consider the totality of the circumstances surrounding the interrogation, and instead only considers the circumstances leading up to and

Mauer testified that, after Hart signed the waiver form, Mauer asked him if he knew anything about the homicides at Elite the previous night. When Hart answered that he did not know anything, Mauer informed him that the police had a witness who had identified Hart as being present during the homicides. Hart then asked to speak to Schuster because he trusted her. Schuster testified that when she arrived Hart asked her whether he should get a lawyer, and she told him that she could not answer that. She left the room for a few minutes to give him time to think about it. When she returned, Hart asked her what were the pros and cons, in her opinion, of hiring a lawyer. Although asking for the pros and cons of hiring a lawyer is not an unequivocal request for counsel, it does indicate that Hart did not fully understand his right to counsel and was asking for clarification of that right.

Schuster responded to Hart's request for clarification by telling him that in her opinion the pros of having an attorney were "He'll protect your rights. He'll tell you what to answer, what not to answer, and he'll be here for you." This was an acceptable response, but then she also told him that the con in her opinion was "I'm going to want to ask you questions and he's going to tell you you can't answer me." Hart asked Schuster for a clarification of his right to counsel, and Schuster responded by telling him that the disadvantage of having a lawyer present was that the lawyer would tell Hart not to answer incriminating questions. The reason for requiring a lawyer during custodial interrogation is to protect a suspect's privilege against self incrimination, yet, Schuster in effect told Hart that this was the disadvantage of having a lawyer.

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including the signing of the waiver form. Furthermore, under such a distinction, a defendant who has been apprized of his rights and signed a waiver form would not be able to later ask for clarification of his rights and expect an honest response from police; instead, police would be permitted to respond to clarifying questions regarding Miranda rights with deception as long as they did so after the waiver form was signed. The signed waiver form does not have talismanic powers; it is merely one piece of evidence to be considered in the totality of the circumstances analysis.

During this colloquy on the pros and cons of hiring a lawyer, Schuster also told Hart that "honesty wouldn't hurt him." Telling him that "honesty wouldn't hurt him" contradicted the Miranda warning that anything he said could be used against him in court.[19] The phrase "honesty will not hurt you" is simply not compatible with the phrase "anything you say can be used against you in court." The former suggested to Hart that an incriminating statement would not have detrimental consequences while the latter suggested (correctly) that an incriminating statement would be presented at his trial as evidence of his guilt.

Schuster's conduct was not unlike the conduct of the FBI agents in United States v. Beale.[20] In Beale, we held that a defendant's Miranda waiver was invalid because, "by telling [the defendant] that signing the waiver form would not hurt him the [FBI] agents contradicted the Miranda warning that a defendant's statements can be used against the defendant in court, thereby misleading [him] concerning the consequences of relinquishing his right to remain silent." Beale, 921 F.2d at 1435. We see no significant difference between the facts presented in Beale and the

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[19] The dissent contends that we have contorted the meaning of the phrase "honesty wouldn't hurt him" by considering the phrase in isolation and out of context. We have not considered this phrase in isolation or out of context. We have considered the phrase along with all of the surrounding circumstances in the context of a suspect asking for a clarification of his rights and a police officer responding with statements that were contrary to the Miranda warnings.

[20] The dissent criticizes our reliance on Beale because Eleventh Circuit precedent cannot announce clearly established federal law, as determined by the Supreme Court. We do not rely on Beale for clearly established federal law as determined by the Supreme Court. Instead, we rely on Beale as an illustration of clearly established federal law applied to similar facts.

facts presented in the instant case.[21] Schuster's statement that honesty would not hurt Hart had the same misleading effect as the FBI agents' statement that signing the waiver form would not hurt the suspect in Beale.

Given the totality of the circumstances surrounding the interrogation, which include Hart's trust of Schuster and Schuster's statements contradicting the Miranda warnings, we cannot say that Hart's decision to waive his rights and confess was voluntary, knowing, and intelligent. His decision to waive his rights and confess was the product of Schuster's deception and, as a result of her contradictory statements, he did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it. Therefore, his waiver was not voluntary, knowing, and intelligent as required by Miranda, and the state court's failure to apply the correct legal standard to this issue resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court.

B.

The admission of statements obtained in violation of Miranda is subject to harmless error scrutiny. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v.

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[21] The dissent also criticizes our reliance on Beale because Beale is easily distinguishable. Beale is easily distinguishable for the dissent because of the dissent's distinction between the Miranda advice of rights phase and the interrogation phase. Because we disagree with this distinction, we do not believe that Beale is distinguishable. The conduct of the FBI agents in Beale would have been just as constitutionally reprehensible if they had lied to the suspect regarding the nature of his rights after he signed the waiver form. A suspect's signature on a waiver form does not give police carte blanche to lie to the suspect about his Miranda rights if he indicates that he does not understand them and asks for clarification.

Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). "This determination requires a two-fold inquiry into (1) the effect of the erroneously admitted statement upon the other evidence introduced at trial, and (2) upon the conduct of the defense." Beale, 921 F.2d at 1435 (citing Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir.1980) (en banc)).

In this case, there is definitely a "reasonable possibility" that Hart's statement contributed to his conviction. At Hart's trial, the prosecution introduced Hart's statement into evidence both through Schuster's testimony and by playing a tape recording of the statement for the jury. The prosecution also presented the testimony of a police expert to contradict the portion of Hart's statement in which he denied shooting the victims. The police expert testified that the physical evidence on the pillow retrieved from the crime scene indicated that all of the shots fired at Todd Klein were fired in rapid succession without removing the muzzle of the rifle from the pillow. This contradicted Hart's statement that he deliberately missed, and Leonard later fired the shots that killed Klein. The only evidence the prosecution presented to link Hart to the murders which was not related to Hart's statement was a fingerprint which was found on the outside of the door to Elite. The fingerprint only established that at some time Hart had touched the outside of the door to Elite; without Hart's statement, it was insufficient to establish his guilt. Aneschka Culmer, the only eyewitness, did not testify. Hart's four co-defendants also did not testify. In short, there is a high probability, much less a "reasonable possibility," that the evidence complained of contributed to Hart's conviction, and the introduction of Hart's statement therefore was not harmless error.

The introduction of Hart's statement likewise had a significant effect on the conduct of the defense. The admission of Hart's statement led his attorney to present a defense based on coercion and duress. He called a neuropsychologist to explain how Hart's background and psychological problems made it easy for Hart to be intimidated and controlled by Leonard. Hart also

testified about his relationship with Leonard and explained his version of the events surrounding the murders. The fact that this testimony would have been unnecessary if the prosecution had not been allowed to present the unlawfully obtained statement is further evidence that the admission of the statement was not harmless error.

III

For the foregoing reasons, we REVERSE the district court and GRANT Hart's petition for writ of habeas corpus.

SO ORDERED.

VINSON, District Judge, dissenting:

I respectfully dissent. My disagreement with the majority exists on three levels. First, factually, I do not agree with the majority that Schuster's statement to Hart that "honesty wouldn't hurt" constitutes a nullification of Hart's Miranda warning and waiver, considering, as we must, the totality of the circumstances. Second, as a matter of law, there is not clearly established law of the Supreme Court of the United States as to whether a post-waiver statement, such as the one at issue in this case, nullifies an earlier, correctly given Miranda warning and waiver. Third, the state court's application of the law, regardless of whether it may be considered as "clearly established," was not contrary to, or an unreasonable application of, Supreme Court precedent.

I. Schuster's Statement Taken Properly in Context

In considering whether Hart's confession was coerced, we must evaluate the totality of the circumstances. Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). There is little disagreement about the facts regarding what transpired in this case. The majority concedes that the police went to "great lengths" to apprise Hart of his Miranda rights. The officer carefully

explained each of the rights to Hart, and Hart indicated both that he knew all about his rights from his prior case, in which Hart was represented by counsel, and that he understood each of the rights before agreeing to answer any questions. After explaining Hart's rights to him, detective Mauer told Hart to initial a place on the Miranda waiver form if he wished to talk to the police without an attorney present, which Hart did. The trial court found that Hart was alert, that he had slept six to seven hours the night before, and that he was able to understand what was explained to him. Hart then signed the waiver, witnessed by both Mauer and Sergeant Perez. After being asked about the homicide, Hart initially denied any knowledge (a lie). After being told that a witness had identified him, Hart requested that Schuster be called to the police station. Upon arrival, Schuster was informed by Mauer that Hart had already waived his Miranda rights. Hart's signed, written Miranda waiver form was on the table. Schuster testified that her purpose for interviewing Hart was to obtain a statement from him.[1] Schuster told Hart that she was obligated to repeat anything Hart told her, and Hart said "let's get started" after Schuster returned from giving him additional time to think about getting an attorney. The trial court found Hart never asked for his grandmother, or for an attorney, to be present during his interrogation. Finally, after describing all that had taken place, Schuster testified in the suppression hearing that she told Hart that "honesty wouldn't hurt

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[1] Which makes sense because Hart had already signed and waived his Miranda rights and agreed to talk to the police.

him."[2] Hart then confessed to Schuster. Hart was later re-Mirandized before he made his taped confession.

When considered in context and in light of the total circumstances, I believe it is reasonable to interpret Schuster's statement of "honesty wouldn't hurt" to mean that, knowing Hart had already waived his Miranda rights, and already willingly agreed to talk to the police, but had already lied to the police, then whatever he said should be truthful. The majority contorts its meaning from a recommendation not to lie into a trick to get Hart to talk about the homicide. Hart knew that he had been identified by an eye-witness to the crime. He had told Detective Mauer that he knew all of his Miranda rights from his prior arrests, but Mauer reviewed his rights again, in detail. Hart had willingly agreed to talk to the police without an attorney present before Schuster even arrived. Hart had already been told that he might face the death penalty if convicted as an adult. The signed Miranda waiver form was on the table in front of Hart throughout his entire conversation with Schuster. Hart had already been told that he was in "the biggest trouble possible"; it was evident that any further lies would only compound his "trouble." Hart knew that he could request a lawyer at any time and that anything he told Schuster would be used against him.[3] Hart understood an attorney's role in our criminal justice system because he had been represented by an

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[2] We do not know Schuster's exact words to Hart. The suppression hearing was conducted more than a year after the interrogation, and the portion of the interrogation where Schuster made her statement was not recorded. Hart also testified at length during the suppression hearing. Importantly, it does not appear that he mentioned anything about any "honesty" statement from Schuster. Plainly, he did not indicate that he had been misled or deceived by such a statement from Schuster.

[3] Schuster apparently reiterated this right to Hart when she reminded him that anything he said to her would not be kept in confidence.

attorney in his recent credit card theft case.[4] Schuster's statement to the effect that "honesty wouldn't hurt him" did not compel Hart's incriminating statement because Hart had already agreed to talk to the police.[5] Honesty is the cornerstone of our system of justice. Witnesses testify under oath because they are required to tell the truth, and dishonesty is not tolerated. In criminal trials, cooperating witnesses testifying for the government are routinely admonished to "tell the truth." It is ironic that the majority finds a statement recommending honesty to be a Miranda nullification. Hart was fully advised of his Miranda rights; his decision to answer the officers' questions was uncoerced; he knew he could request a lawyer at any time and that any statement he made to Schuster would be used against him.

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he

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[4] The credit card theft case was still pending when Hart was questioned in relation to this case because the police told Hart the credit card theft case was the subject of the initial interrogation. In his motion to suppress, Hart argued to the trial court that the police should have contacted the attorney that represented him in the credit card theft case before questioning him in the murder case and that the failure to do so violated his Sixth Amendment right to counsel. The trial court rejected this claim, and correctly so.

[5] Both the trial court and the district court found that Hart had clearly waived his Miranda rights before he spoke to Schuster. Of course, Hart could have ceased the interrogation at any time, even after his waiver, by asserting his right to remain silent or to seek counsel. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Unless that assertion is unequivocal, the police could continue questioning Hart. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The state court found Hart's inquiries were not unequivocal, and Hart does not challenge that finding on appeal.

> was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Moran v. Burbine, 475 U.S. 412, 422-23, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

The majority apparently believes that Hart took Schuster's statement literally and confessed because he truly believed he would not be prosecuted if he confessed, despite all of the information Hart had previously been given about the implications of confessing. There is no evidentiary support for that conclusion. All of the facts of this case point to a knowing, voluntary, and intelligent waiver of Hart's rights, supporting the rulings of the three prior courts which have reviewed the Miranda challenge in this case. Those courts did not feel that it was necessary to even address Schuster's statement to Hart that "honesty wouldn't hurt him" for the simple reason that it was apparently not raised as a distinct issue in the state courts.[6] Because I conclude from the totality of the undisputed evidence in the record that Hart's statement was "uncoerced," that he knew at all times that he could "stand mute and request a lawyer," and that he understood the consequences of his confession, Hart's waiver of his Miranda rights was "valid as a matter of law." Id. The state court's factual

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[6] In a very thorough order (totaling nineteen pages for all defendants), the trial judge ruled on the three Miranda issues raised by the defendant in the suppression hearing: (1) "whether the deceptive means of bringing the defendant in for questioning should nullify compliance with the standards for free and voluntary confessions mandated by Miranda ...."; (2) "what duty do the police owe a juvenile to have a parent present for questioning?"; and (3) "was there a clear and unequivocal request for counsel?" After deciding against Hart on all three of these issues, the trial judge concluded: "This Court finds that Hart's statements were freely, voluntarily, and intelligently made and his motion to suppress these statements is denied."

findings are presumed correct unless rebutted with "clear and convincing" evidence. 28 U.S.C. § 2254(e)(1).

Factually, the state trial judge considered all of the evidence presented at the suppression hearing and concluded, after a lengthy analysis, "that Hart's statements were freely, voluntarily, and intelligently made." The majority's conclusion that the state courts had not "analyzed whether Hart's colloquy with Schuster resulted in a waiver that was not voluntary, knowing, and intelligent" is obviously at odds with the record.

II. Clearly Established Federal Law

I also disagree with the majority that Supreme Court precedent is "clearly established" on this issue. Title 28, United States Code, Section 2254(d)(1) requires that, in order for a federal court to grant a writ of habeas corpus, the state court's decision must be contrary to or be an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." (emphasis added). Clearly established federal law for the purposes of Section 2254 is not the law of lower

federal courts, including this court.[7] Hall v. Head, 310 F.3d 683, 691 (11th Cir.2002).

Only the holdings of the Supreme Court constitute clearly established federal law for the purposes of Section 2254. Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Miranda warning requirement and its contents are certainly clearly established. Dickerson v. United States, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966). That a valid Miranda waiver must be made knowingly, voluntarily, and intelligently is also clearly

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[7] I also disagree with the majority when it fails to see any "significant difference between the facts presented in Beale and the facts presented in the instant case." Majority Opinion, supra, at ___. Beale involved the authorities inducing a barely literate Spanish-speaking suspect to sign a Miranda waiver by telling him that signing the waiver would not hurt him. Beale is thus a case of fraud in the inducement to sign a waiver, where the suspect was misled as to the waiver's effect. Further, the only relevant Supreme Court case cited by Beale, other than Miranda itself, is California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), for the general proposition that Miranda warnings should not be misleading. See United States v. Beale, 921 F.2d 1412, 1435 (11th Cir.1991). Thus, Beale does not illustrate how clearly Supreme Court precedent is established. In this case, unlike Beale, there is no dispute that Hart was alert, intelligent, and fully informed of his rights prior to both the execution of the Miranda waiver and the making of his incriminating statement. The police painstakingly informed Hart of his rights prior to questioning him, and he clearly acknowledged that he understood his rights. There can be no doubt from the record that Hart understood his Miranda rights and that he freely, knowingly, and intelligently waived his Miranda rights.

established.[8] Moran v. Burbine, supra, 475 U.S. at 421, 106 S.Ct. at 1141, 89 L.Ed.2d at 421.

What post-waiver statements amount to retroactive nullification of a prior valid Miranda waiver, if that is even possible, has not been clearly established by the Supreme Court. In fact, a suspect's uncoerced, fully informed decision not to assert his Miranda rights is a valid waiver as a matter of law, even when followed by some coercion in the interrogation process. Moran v. Burbine, supra, 475 U.S. at 422-23, 106 S.Ct. at 1141, 89 L.Ed.2d at 422. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." Id. at 427, 106 S.Ct. at 1144,, quoted in Davis v. United States, 512 U.S. 452, ____, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). "A suspect who knowingly and voluntarily waives his right to counsel after having the right explained to him has indicated his willingness to deal with the police unassisted." Davis, supra, 512 U.S. at 460-61, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). "[A] careful and thorough administration of Miranda warnings [even] serves to cure the condition that rendered [a prior] unwarned statement inadmissible," allowing a subsequent post-warning confession to be admissible. Oregon v. Elstad, 470 U.S. 298, 310, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

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[8] The majority's contention that it can "derive clearly established law from these general principles rather than waiting for bright line rules," Majority Opinion, supra, at n. 16, undermines the clearly established law requirement and masks the de novo review the majority really is applying to this case. It also further undermines the "materially indistinguishable facts" aspect of the "contrary to" clause analysis, which also contemplates application to multi-variant factor analyses.

Even if one assumes, as the majority seems to do,[9] that Schuster's statement was made while still in the Miranda waiver process, there is no "clearly established" Supreme Court decision that indicates such a statement constitutes nullification.[10] See, e.g., Duckworth v. Eagan, 492 U.S. 195, 205, 109 S.Ct. 2875, 2881, 106 L.Ed.2d 166, 178 (1989)(holding that telling suspect he would be provided a lawyer if and when he went to court did not contravene Miranda); Moran v. Burbine, supra, 475 U.S. at 424, 106 S.Ct. at 1142, 89 L.Ed.2d at 422 (deliberate or reckless withholding of information from suspect in custodial interrogation is only relevant to constitutional validity of Miranda waiver if it deprives the suspect of knowledge "essential to his ability to understand the nature of his rights and the consequences of abandoning them."). Failure to administer the Miranda warnings at all only raises a presumption of involuntariness. Elstad, supra, 470 U.S. at 310, 105 S.Ct. 1285, 84 L.Ed.2d 222; Miranda, supra, 384 U.S. at 457, 86 S.Ct. 1602, 16 L.Ed.2d 694. The majority cites no Supreme Court case where post-warning misrepresentations by police nullified a Miranda waiver. In fact, the Supreme Court has specifically declined to consider whether an affirmative misrepresentation by law enforcement would invalidate an otherwise valid waiver: "In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of Miranda rights would be valid in such a

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[9] Contrary to the findings of both the state court and the district court.

[10] Assuming Hart had not yet waived his rights, I interpret Schuster's statement as reasonably meaning that, if Hart was going to talk to the police, he should tell the truth.

circumstance."[11] Colorado v. Spring, 479 U.S. 564, 576 n. 8, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987)(holding police officer's failure to inform suspect of all possible subjects of interrogation was not relevant to determining whether waiver was voluntary, knowing, and intelligent). Because Supreme Court precedent is not clearly established on the issue of whether or what post-waiver representations can nullify a prior valid Miranda waiver, granting the writ is prohibited by Section 2254(d).

III The State Court's Decision was not Contrary to Supreme Court Precedent

I further disagree with the majority's conclusion that the trial court's decision was "contrary to" clearly established Supreme Court precedent. The Supreme Court of the United States has explained the framework of Section 2254 review in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The appropriate test was described by Justice O'Connor as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of... clearly established Federal law, as determined by the

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[11] Hart raised this exact issue to the trial court by arguing that the police tricked him into coming to the police station for questioning about his credit card theft case. The trial court properly relied upon Florida case law to resolve this issue against Hart.

> Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. at 412-13, 120 S.Ct. at 1523, 146 L.Ed.2d at 430 (O'Connor, J., concurring, and writing for the majority of the Court as to Part II of the opinion which deals with this issue.)

Under the "contrary to" clause of Section 2254(d)(1), therefore, a writ of habeas corpus may only be granted where the state court decision either "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or the state court "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent."[12] Williams, supra, 529 U.S. at 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389. The "contrary to" clause in Section 2254(d)(1) "suggests that the state court's decision must be substantially different ...'opposite in character or nature' [or] 'mutually opposed' " to clearly established Supreme Court precedent. Id. at 405, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (citing the definition of "contrary" in

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[12] Justice O'Connor provided an example of a decision that would be "contrary to" Supreme Court precedent. Where a state court required a different evidentiary burden to establish an ineffective assistance of counsel claim than that expressly identified in governing Supreme Court case law, the state court would apply a rule contradictory to governing law. Williams, 529 U.S. at 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)).

As long as the state court applies the "correct legal rule," the federal courts cannot substitute their own judgment to reach a different result under the "contrary to" clause, as we have held:

> Although a state court's decision that "applies a rule that contradicts" the governing Supreme Court precedent is "contrary," a state court decision that applies "the correct legal rule" based on Supreme Court law to the facts of the petitioner's case would not fit within the "contrary to" clause even if the federal court might have reached a different result relying on the same law.

Fugate v. Head, 261 F.3d 1206, 1216 (11th Cir.2001)(internal citations omitted); see also Bell v. Cone, 535 U.S. 685, ___, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914, 929 (2002) (because state court identified correct legal rule "we find no merit in respondent's contention that the state court's adjudication was contrary to our clearly established law.")

The record reflects that the state court did identify and apply the correct governing legal rules.[13] Where the Supreme

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[13] The issues presented to us were also thoroughly briefed to the Florida Third District Court of Appeal, which affirmed the judgment of the district court without opinion. The trial court's reliance upon the Supreme Court's decision in Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), was most appropriate. Davis is the governing Supreme Court precedent on ambiguous invocations of the right to counsel. Having determined that Hart made his statement to the police freely, voluntarily, and intelligently, the only alternative basis for suppression presented to the trial court was that Hart had, in his discussion with the police, invoked his right to counsel.

Court has articulated a multi-factor balancing test or all-encompassing "totality of the circumstances" test and the state court applies that test, it is especially difficult for a federal court to conclude that a state court's decision was contrary to Supreme Court precedent. When applying such a test, I agree with our colleagues in the First Circuit that reversing the state court under the "contrary to" clause must be only in a case where the legal application requires a particular result. See Kibbe v. DuBois, 269 F.3d 26, 35 (1st Cir.2001)(quoting O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir.1998)). Where the Supreme Court has distilled constitutional principles into a "channeled mode of analysis specifically intended for application to variant factual situations," a state court's decision that is not based on facts materially indistinguishable can only be "contrary to" clearly established federal law where the application of the articulated framework "can fairly be said to require a particular result in a particular case." Id. Only if the application of the totality of the circumstances test necessarily required a determination that Hart's confession was involuntary would I find that the state court's decision, which was not based on materially indistinguishable facts, is "contrary to" Supreme Court precedent. This is not such a case.

The majority concludes that the decisions of the state courts were contrary to Supreme Court precedent because "Neither court ... analyzed whether Hart's colloquy with Schuster resulted

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On its facts, Davis, is actually similar to this case, except that, as the trial court correctly concluded, Hart did not unequivocally invoke his right to counsel. See id. at 455, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (suspect advised of rights, waived rights orally and in writing, later made equivocal statements about getting a lawyer, and eventually clearly
invoked right to counsel).

in a waiver that was not voluntary, knowing, and intelligent." [14]But the trial judge, who heard all of the evidence, including Schuster's testimony, specifically concluded, "This Court finds that Hart's statements were freely, voluntarily and intelligently made and his motion to suppress these statements is denied." I fail to understand how the majority apparently believes that the trial court did not analyze and consider the totality of the circumstances in making this determination.[15] The record plainly reflects that the trial court did, in fact, consider the "totality of the circumstances." Addressing Hart's claim that his grandmother should have been present during the interrogation, the trial court stated, "This court finds that the totality of the circumstances indicate that Hart had no desire to see his grandmother and his decision to waive his rights was not contingent upon his meeting with her." As support for this statement, the trial court cited Doerr v. State, 383 So.2d 905, 907 (Fla.1980), wherein the Supreme Court of Florida agreed with a lower court's statement that:

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[14] The exact issue presented to the trial court was not focused on just three words ("honesty wouldn't hurt") in the lengthy interview described in the record, but rather on the totality of the circumstances. Hart argued generally that his confession was involuntarily obtained because it was obtained through police threats and direct or implied promises of leniency or benefits. Hart did not testify or argue that Schuster's statement to Hart that "honesty wouldn't hurt him" coerced his confession.

[15] The majority seems to mean that the trial court did not consider what the majority, on de novo review, now concludes is the most important of the totality of the circumstances, Schuster's isolated statement. The majority's de novo approach to the review of the voluntariness of Hart's confession typifies the pre-1996 approach to habeas corpus review of such confessions. Compare Miller v. Fenton, 474 U.S. 104, 110-11, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). After the Anti- Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104- 132, § 104, federal courts are required to apply a more deferential standard for habeas review of state court decisions.

> The United States Supreme Court has held that the admissibility of a juvenile confession depends on the "totality of the circumstances" under which it was made. Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). The more immature the juvenile may be, the greater the likelihood exists that his confession will be deemed inadmissible. The fact that a juvenile's confession was given before he had the opportunity to talk with his parents or an attorney is certainly a factor militating against its admissibility. But, the existence of this fact does not preclude a finding of voluntariness depending upon all of the other circumstances surrounding the confession.

Doerr v. State, supra, 383 So.2d at 905-907 (quoting with approval Doerr v. State, 348 So.2d 938 (Fla. 2d DCA 1977)).

The trial court also cited State v. Paille, 601 So.2d 1321, 1324 (Fla. 2d DCA 1992), which noted: "The test of admissibility of a juvenile confession is the totality of the circumstances under which it was taken." (emphasis added). It is clear that the trial court identified the correct governing legal rule-- that the admissibility of a confession ("voluntary, knowing, and intelligent") is to be evaluated based on the totality of the circumstances.

Further, the trial court made a number of findings in evaluating the circumstances surrounding Hart's confession.[16] The trial court found that Hart was calm, alert, intelligent, knowledgeable about the criminal justice system, capable of understanding his rights, and that he had six to seven hours of sleep the night before the interrogation. Contrary to the majority's assumption, Hart understood (and told Mauer that he understood) his right to an attorney because he was represented by counsel in his recent credit card theft case. There is no evidence that the interrogation was excessively long. The police even ordered pizza for him to eat. "Any statement [by the suspect] given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Illinois v. Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990)(quoting Miranda, supra, 384 U.S. at 478, 86 S.Ct. 1602, 16 L.Ed.2d 694).

According to the majority's version of the totality of the circumstances, Schuster's statement to Hart that "honesty wouldn't hurt him" and her opinion as to the pros and cons of getting a lawyer compelled Hart to involuntarily confess and made his waiver a product of her deception.[17] Miranda ' s prophylactic purpose is to guard against coerced confessions obtained in violation of the Fifth Amendment. Subtle coercion inherent in the interrogation process is remedied by prior advisement and understanding of Miranda rights, which give the suspect the power to halt the interrogation. As noted earlier, the Supreme Court has

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[16] See Fare v. Michael C, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)(factors for evaluating juvenile confession include the suspect's age, experience, education, background, intelligence, capacity to understand the Miranda warnings, the nature of his Fifth Amendment rights, and the consequences of waiving those rights).

[17] Of course, Schuster could not have coerced Hart to sign the Miranda waiver form because she was not yet present when Hart signed the form.

held that a knowledgeable Miranda waiver is not nullified by such coercive interrogation: "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." Moran v. Burbine, supra, 475 U.S. at 427, 106 S.Ct. 1135, 89 L.Ed.2d 410. "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." Oregon v. Elstad, 470 U.S. 298, 308, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Schuster's conversation with Hart was not the type of coercive police activity that "threatened, tricked or cajoled" him into confessing. Miranda, supra, 384 U.S. at 476, 86 S.Ct. 1602, 16 L.Ed.2d 694. Schuster told Hart she could not make the decision whether to seek a lawyer for him. When Hart asked about the pros and cons, Schuster gave Hart her opinion, but Hart's inquiries do not mean that he failed to understand his right to counsel. He certainly understood that right because he had an attorney in another case. Nor does it mean that he was uncertain about whether his statements could be used against him. Instead, it is apparent that Hart was simply trying to figure out the best way to minimize the "big trouble" he was in. Schuster's discussion with Hart and her statement to Hart that "honesty wouldn't hurt him" was certainly not, in light of the totality of the circumstances, coercive to the point that it compelled Hart to confess against his will. The state court's decision was not "contrary to" any Supreme Court precedent, and granting of the writ is improper.

IV The State Court's Decision was not Unreasonably Erroneous

Finally, I also want to address why the state court's decision was not unreasonable. See 28 U.S.C. § 2254(d)(1); Williams, supra, 529 U.S. at 411, 120 S.Ct. at 1522, 146 L.Ed.2d at 429 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the

relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.")(emphasis added). This court may not grant a writ of habeas corpus simply because it would have decided the case differently. Woodford v. Visciotti, ___ U.S. __, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002)(per curiam)(reversing Ninth Circuit for substituting its own judgment for that of state court). The 1996 amendments to Section 2254 create a heightened standard on collateral review, increasing the deference to state court resolutions of arguable constitutional questions. The appropriate analysis is to first determine whether the state court's decision was incorrect and, if so, then to determine whether the state court's error was objectively unreasonable.[18] Id.; Penry v. Johnson, 532 U.S. 782, 793, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); Brown v. Head, 272 F.3d 1308, 1313 (11th Cir.2001)("It is objective reasonableness, not correctness per se, of the state court decision that we are to decide."); Boss v. Pierce, 263 F.3d 734, 739 (7th Cir.2001)(state court decision's application of Supreme Court precedent must be "so erroneous as to be unreasonable.")(emphasis added). Justice O'Connor's portion of the plurality opinion in Williams v. Taylor explained that a state court's decision would be unreasonably erroneous where the decision correctly identified the governing clearly established legal rule, but unreasonably applied

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[18] The former is an analysis of the law: whether the decision was erroneous as a matter of law. The latter externally considers the concreteness with which the law has developed as a guide to state court decision-making: whether the decision was so erroneous as to be objectively unreasonable under the facts of the case. Bifurcating the analysis allows principles of constitutional law to continue to be clarified through the habeas system by purely evaluating the correctness of the state court's decision, akin to harmless error review.

that rule to the facts of the case.[19] See Williams, supra, 529 U.S. at 407-08, 120 S.Ct. at 1520-21, 146 L.Ed.2d at 427.

In seeking to suppress his confession, Hart testified in the suppression hearing and argued to the state court that his confession was not freely and voluntarily given because it was obtained through police threats and direct or implied promises of leniency or benefits. The trial court concluded Hart's statements were freely, voluntarily, and intelligently given. As discussed earlier, this was predominantly a factual conclusion, within the Miranda legal framework as properly identified by the trial judge. For the same reasons that I conclude the state court's decision was not "contrary to" clearly established Supreme Court precedent, I also conclude the state court's denial of suppression was neither an "unreasonable application" of the law nor an "unreasonable determination" of the facts. The state court identified the governing legal rule, considered the totality of the factual circumstances, and correctly applied that rule to the facts of this case. We are prohibited by Section 2254(d)(1) from second-guessing the state court as to the factual application of a legal issue which is far from clearly established. "[I]f it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir.2002). I believe that consistent application of the unreasonable application standard leads to the inescapable conclusion that there can be no "unreasonable application" of the law in this case. The trial court's decision was also not an "unreasonable determination" of the facts in light of the evidence presented.

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[19] In Williams, Justice O'Connor also noted that extending a legal principle to a new context, or a failure to do so, may present "problems of precision" under the "unreasonable application" clause. The Supreme Court declined to decide how that type of case should be treated under Section 2254(d)(1). Williams, supra, 529 U.S. at 408, 120 S.Ct. at 1521, 146 L.Ed.2d at 427.

Because neither the majority nor I can identify clearly established Supreme Court precedent which would mandate nullification of Hart's Miranda warning and waiver, we are left without an external basis, other than our own subjective opinion, for evaluating the state court's decision. Taking Schuster's statement properly in factual context, I conclude that the trial court correctly evaluated the facts before it, but even if it did not, the trial court's decision definitely was not an objectively "unreasonable" determination of the facts. Nor was the trial court's ruling "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." I believe that we are required by Section 2254(d)(1) to affirm the district court's decision.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-15571-GG

ROBERT ARTHUR HART,

Petitioner-Appellant,

versus

ATTORNEY GENERAL FOR THE STATE OF FLORIDA,
SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19___, _____F.2d_____).

Before: TJOFLAT and KRAVITCH, Circuit Judges, and VINSON[*], District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATED CIRCUIT JUDGE

ORD-42

(12 / 01)

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[1] Honorable C. Roger Vinson, United States Judge for the Northern District of Florida, sitting by designation

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1999

ROBERT ARTHUR HART,

Appellant,

vs. CASE NO. 98-572

THE STATE OF FLORIDA, LOWER
TRIBUNAL NO. 94-22487

Appellee.

Opinion filed September 8, 1999.

An Appeal from the Circuit Court for Miami-Dade County, Barbara S. Levenson, Judge.

Bennett H. Brummer, Public Defender, and Lisa Walsh, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Paulette R. Taylor, Assistant Attorney General, for appellee.

Before JORGENSON, GERSTEN, and GREEN, JJ.

PER CURIAM.

Affirmed. See State v. Owen, 696 So.2d 715 (Fla.), cert. denied, 522 U.S. 1002, 118 S.Ct. 574, 139 L.Ed.2d 413 (1997); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Dell v. State, 661 So.2d 1305 (Fla. 3d DCA 1995).

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA, CRIMINAL DIVISION (15)

Plaintiff, Barbara S. Levenson

vs. CASE NO. 94-22487 (A,B,C,D,E)

ROBERT HART, JAMES LEONARD,
NELSON VARGAS, JURI QUINLAND,
JASON MONTE-PERINI,

Defendants.

_____/

ORDER ON MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

This cause came on to be heard on all five Defendants Motions to Suppress Statements, and Defendants Monte-Perrini's Motion to Suppress Evidence. After review of all motions, a lengthy evidentiary hearing, and memoranda of law from each party, this court denies the Motion to Suppress the statements of Hart, Leonard, Vargas and Quinland. This court grants the motion to suppress the statements of Monte-Perrini, but denies the Motion to suppress evidence. This order is based on the following.

All five defendants are accused of armed robbery and homicide at the Elite Photography studio on July 3, 1994. The

manager and on model were murdered. A second model was taken to her home by perpetrators.

When the police learned a second model was working that night, they contacted her and she eventually told the police what had occurred including the descriptions of each participant, the names she had overheard and a description fo the truck in which they had left the scene, a small blue late model pickup truck. One of the names was "Rollex". Base on her information, each of the defendants was picked up during the next day and brought to the North Miami Beach Police station for questioning. Each defendant gave a statement.

ROBERT HART

Detective were familiar with "Rollex" from previous credit card theft case. The co-defendant in that case was Robert Hart. The credit card theft victims were Hart's grandparents with whom he resided. The model identified Hart and Rollex (James Leonard) from photographic lineups.

The first person the police picked up was Robert Hart. Detective Hill testified that he contacted Hart's grandmother and told her they needed to speak to Robert. Hill was the detective in the credit card case. Robert Hart was seventeen (17) years old at the time.

Hart's grandmother testified that the officers could come to the house. Detective Hill arrived along with other detectives and stated that they needed to take Robert to the station to talk about "the case" and to sign some papers. The grandmother never asked if she could or should go with them. According to her testimony, she said she would pick him up later. Detective Hill stated that she asked if they would bring Robert home. He told her he would if Robert needed a ride. They left around 11:15am.

At the station, Detective Hill briefly discussed the past case with Robert and asked him if he had been staying out of trouble. He then told Robert that Detective Mauer wished t speak to him about another case.

Mauer immediately read Hart his Miranda Rights. Hart stated that he knew all about this rights from his prior case. Nevertheless, Mauer explained them again and Hart signed or initialed each line. Hart had slept six (6) or seven (7) hours the night before, appeared alert and able to understand. Mauer knew Hart from a previous case where Hart had been a victim.

Hart never asked to see a lawyer or his grandmother but after some initial questioning, he asked to see Detective Schuster, a female officer who worked specifically with juvenile gangs.

Detective Schuster was called at her home at 2:00p.m. and she arrived at the station around 3:00p.m. She went to the interview room where hart was eating a pizza. Detective Schuster testified that Hart asked her if he was in "big trouble." Detective Schuster told him, "you're in the biggest trouble you could ever be in." Hart asked Schuster about the possible penalties, to which she replied that if tried as an adult, he could face the death penalty. Hart then inquired whether Detective Schuster would talk without a lawyer if she were "in his shoes". Detective Schuster stated that she could not answer that, and he would have to make his own decision about that. She then told him to think it over, and she left the room to give him time to think.

A short time later, Detective Schuster re-entered the interview room. Hart asked Schuster what the "pros and cons" of having an attorney would be. Schuster asked Hart if he was seeking her opinion. When Hart responded in the affirmative, she told Hart, "in my opinion, if you have an attorney he'll come in. He'll protect your rights. He'll tell you what to answer, what not answer, and he'll be here for you. That's the pro. The con, in my opinion, is I'm going to want to ask you questions and he's going to tell you can't answer me." Hart reflected for a short time and then said, "let's get started." Hart never asked for his grandmother, a lawyer, or any other person to be present.

Hart's grandmother testified that she arrived at the station between 1:30 and 2:00 p.m. to pick up her grandson to attend a

July 4th barbecue. After waiting around thirty (30) minutes, she again requested that they informed Hart that she was here to pick him up. Detective Mauer then came to the reception area and told the grandmother that Hart was the witness to a murder, that she should go home and they would call her. She left.

Later, Mauer called her to return to the station and to bring Hart's clothes.

The grandmother never asked to see Hart and Hart never asked to see the grandmother. In fact, he refused to see her when she returned to the station with his clothes and only did so at the urging of Detectives Mauer and Schuster.

The defendant testified at the hearing. His testimony was similar to the other witnesses except that he stated that he asked for an attorney several times. Hart further stated that he never asked to see his grandmother even thought he knew she would be at the station to pick him up.

The grandmother, on cross-examination, did indicate that Hart been upset the night before and had been out with "Rollex."

After hearing the defendant's taped statement and his in-court testimony, this court finds that the defendant was calm, spoke in detail and seemed knowledgeable about the criminal justice system. The grandmother also appeared articulated and far from naive.

There are three issues to examine in determining whether to suppress Hart's statement:

1. Whether the deceptive means of bringing the defendant in for questioning should nullify compliance with standards for free and voluntary confessions mandated by Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602, 16 L. Ed 2d 694 (1966)?

It is clear that Hart and his grandmother believed Robert was going to talk about his credit card theft case. However, his

grandmother knew he had been upset the night before and had been out with the same person involved in the credit card case.

Jones v. State, 657 So. 2d 1190 (Fla. 3d DCA 1995), has settled the law as to this issue. Even if deceptive means drew Hart to the station, once he was properly Mirandized and his statement was given freely and voluntarily, it is admissible. In this case, the defendant came to the station to discuss another felony matter. When he was turned over to Detective Mauer, he was told this was for another case.

Mauer promptly read Hart his rights and told him he was investigating a homicide. When Hart asked to meet with Detective Schuster, she was summoned to the station and had immediate access to Hart.

Under Jones, supra, Hart's confession is admissible.

2. What duty do the police owe a juvenile to have a parent present for questioning?

First, the police have a statutory duty to notify the parent or guardian that they have their child in custody. (Section 39.037 Fl. Stats.) The officers complied with this statute. Hart's grandmother was telephoned that the police were coming over to take Robert to the station. Next, Detective Hill told the grandmother they wanted to talk about the credit card case and possibly get him admitted to a remedial program. This was felony case. The grandmother gave permission for Hart to accompany them. She never asked to come with them.

When Hart was arrested on the murder charge, the officers called the grandmother to return to the station with clothes for Hart.

A juvenile's confession, given after he is taken into custody is not automatically rendered inadmissible just because it was given prior to notification of his parents. The purpose of this notification is simply to advise the parent of the child's

whereabouts. Doerr v. State, 383 So. 2d 905 (Fla. 1980); State v. Paille, 601 So. 2d 1321 (Fla. 1992).

The grandmother's appearance at the station the first time was because she wanted to pick Hart up and take him to a barbecue. When the officer told her he was being questioned regarding witnessing a murder, she left. She never ordered them not to speak to him, nor did she call a lawyer.

"The child" was over seventeen (17) years old at the time, had quit school, and was free to come and go at night as he pleased. This court finds that the totality of the circumstances indicated that Hart had no desire to see his grandmother and his decision to waive his rights was not contingent upon his meeting with her.

3. Was there a clear and unequivocal request for counsel must be made by an accused to trigger a cessation of questioning by police officers. Davie v. U.S., 114 S.CT. 2350, 129 L.Ed.2d-362 (1994).

Hart never made such a request in his taped statement. He was advised of his right to an attorney on the tape and prior to giving any statement. He commented that he knew all about his rights.

Hart's conversation with Detective Schuster weights the possibility of an attorney but could hardly qualify as an unequivocal demand for counsel.

Hart's assertions at the suppression hearing that he continuously asked for an attorney must be weighed for credibility. They lack this quality.

The defendant also complains that he was represented by counsel in his credit card theft case and therefore the police were obligated to contact the attorney before questioning him in the murder case.

The Sixth amendment Right to counsel is "offense-specific" and cannot be invoked once for all future prosecutions. See McNeil v. Wisconsin, 111 s.Ct. 2204, 115 L.Ed.2d 158 (1991); Knight v. State, 512 So.2d 922 (Fla. 1987). In this case, Hart was specifically informed of his Miranda Rights before being questioned about the murder case. See knight, supra (defendant entitled to a fresh set of warnings before interrogation in a different case.)

This Court finds that Hart's statements were freely, voluntarily and intelligently made and his motion to suppress these statements is denied.

....

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 12th day of March, 1996.

BARBARA S. LEVENSON

Copies furnished to:

A.S.A. David Gilbert

A.S.A. Abbe Rifkin

Howard Sohn, Esq.

Don. West, Esq.

A.P.D. P. Ferrero

Larry Handfield, Esq.

Barry Wax, Esq.

Amendment V, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED

03 440 AUG 29 2003

OFFICE OF THE CLERK

CASE NO. 03-__

IN THE UNITED STATES SUPREME COURT

THE STATE OF FLORIDA,
Petitioner,
vs.
ROBERT ARTHUR HART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

RICHARD POLIN
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25 pp

CASE NO. 03-__

IN THE UNITED STATES SUPREME COURT

THE STATE OF FLORIDA,
Petitioner,
vs.
ROBERT ARTHUR HART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Order Denying Petition For Writ of Habeas Corpus, U.S. Dist. Court, August 30, 2001 ..... A-52-77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-4200-CIV-GOLD/SIMONTON

ROBERT ARTHUR HART,

Petitioner,

v.

MICHAEL W. MOORE
Secretary, Florida
Department of Corrections,

Respondent,

and

THE ATTORNEY GENERAL
OF THE STATE OF FLORIDA,

Additional Respondent.
_____/

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

I. INTRODUCTION

Robert Hart, a person now in custody of the State of Florida under a sentence of life imprisonment, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 [D.E. # 1] on November 3, 2000, claiming that he is being held in violation of

the Fifth Amendments to the Constitution of the United States. The Respondents have filed a response in opposition to the petition [D.E. 11]. Hart has filed a reply [D.E. # 14]. The Court held a status conference on December 4, 2000, soon after the case was filed. The parties agreed that an evidentiary hearing was not necessary. Oral argument was held on April 13, 2001.

II. BACKGROUND

On July 20, 1994, Hart and four co-defendants were indicted for two counts of first degree murder, two counts of armed robbery, armed kidnaping, armed burglary, and the unlawful possession fo a firearm while engaged in a criminal offense [Ex. A, pp. 1-7]. Following a jury trial, Hart and his co-defendants were found guilty and sentenced.

Prior to the commencement of the jury trial, Hart filed a motion to suppress his statements, admissions and/or confessions with the Eleventh Judicial Circuit in and for Dade County, Florida (Case No. F94-22487)[Ex. A, pp. 37-84]. The motion was significantly detailed. By the motion, Hart raised three

arguments. First, he claimed that his waiver of his right to remain silent under both the United States and Florida Constitution was invalid and involuntary because he was tricked into the waiver by an affirmative police misrepresentation as to the nature and scope of the subject interrogation [Ex. A, p. 61]. Second, he claimed that his oral and recorded statements were obtained by the police in violation of this Sixth and Fifth Amendment right to counsel [Ex. A, p. 67]. Finally, he argued that his oral and recorded statements were not freely and voluntary given, as they were obtained by the police through the use of threats and direct or implied promises of leniency and benefits [Ex. A, pp. 76].

The trial judge conducted an evidentiary hearing on Hart's motion to suppress on November 6, 1995. [1]At the conclusion of the hearing, the trial judge requested memoranda of law on all issues and indicated that she was "going to issue an order". [Ex. A, p. 866]. Evidently, the trial judge signed an order

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[1] Petitioner's co-defendants also filed motions to suppress. The trial judge conducted a single hearing on all the motions.

on March 12, 1996 [Government's Supp. Ex. 1], with copies furnished to counsel. For whatever reason, the trial judge's order was not recorded of record until August 4, 1999. It does not appear, therefore, in the index of proceedings which was furnished to the Florida Third District Court of Appeal. In their appellate briefs to the Florida Third District Court of Appeal, neither party made reference to the order. Both parties stated that the record did not indicate if the trial court ever ruled on Hart's motion to suppress. Hart claimed that the fact that the defense counsel renewed his motion during the trial is an indication that the court denied the motion. [Ex. C, Appellant's Brief, p. 7 n. 1: Government's Brief, p. 14 n. 4]. The official appellate index affirms that the transcripts of both September 15th and November 14th suppression hearing were filed with the Florida Third District Court of Appeal.

In his main brief, Hart argues at length that the trial court erred in denying his motion to suppress his confession in that it was illegally obtained in violation of the Defendant's rights

pursuant to Article 1, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution [Ex. C, Appellant's brief, pp. 15 through 30]. A complete recitation of the suppression hearing was addressed by both parties in their presentation of the facts. Accordingly, the Florida Third District Court of Appeal had before it the full record below, although the trial judge's ruling was not explicated. Upon review, the Third District Court of Appeal issued a *per curiam* opinion affirming Hart's conviction. *Hart v. State*, 741 So. 2d. 595 (Fla. 3rd DCA 1999). In its opinion, the Third District Court of Appeal cited to *State v. Owen*, 696 So. 2d 715 (Fla. 1997), *cert. denied, Owen v. Florida,* 522 U.S. 1002, 118 S.Ct. 574 (1997); *Adams v. State*, 412 So. 2d 850 (Fla. 1982), *cert. denied*, *Adams v. Florida*, 459 U.S. 882, 103 S. Ct. 182 (1982); and *Dell v. State*, 661 So. 2d 1305 (Fla. 3rd DCA 1995). [Ex. F]. Hart filed a motion for rehearing, arguing that *Owen* was inapplicable to the instant case [Ex. G]. The motion for rehearing was denied. [Ex. H].

III. THE SUPPRESSION HEARING.

The testimony at the suppression hearing establishes that North Miami Beach detectives wanted to interrogate Robert Hart concerning two homicides at the "Elite Photography Studio," a private strip club. (Ex. A, p. 508). One of the officers was Detective Hill. Hill knew Hart and his grandmother (Hart's guardian) from a prior case involving a burglary and credit card theft. *Id.* Hill was directed to bring Hart to the police station. (Ex. A, p. 509). Hill was accompanied by Detective Dareden and Nelson. *Id.* Hill arrived at Hart's home and told his grandmother that he needed to talk to Hart at the police station. (Ex. A, p. 510). She raised no objection. *Id.* At the time, Hart was not under arrest. *Id.* He was not handcuffed. *Id.* He was taken without restraint to the police station, which was five to six minutes from his home, and placed in the interview room. (Ex. A, p. 511). He voluntarily accompanied Hill. He was not read his *Miranda* rights because he was not under arrest. (Ex. A, p. 530). Initially, only Hill went with Hart. *Id.* They talked about Hart's previous case.

Hill ask Hart if he was in any trouble since the last arrest. (Ex. A. p. 513). Hart said no. *Id.*

As Hill was leaving the interview room, he told Hart that another detective wanted to talk with him about another case. (Ex. A, p. 514). Hart did not acknowledge or say anything. *Id.* He did not tell Hart that he could go home, but Hart was not under arrest. (Ex. A at 529, 531). Shortly after Hill left the interviewing room, Detective Michael Mauer arrived. (Ex. A, p. 533). Mauer was involved in the investigation of the homicide. He had already known Hart for a few years. (Ex. A, p. 541). He told Hart that he wished to speak with him. (Ex. A, p. 542). Mauer was not wearing a weapon. *Id.* He advised him of his *Miranda* rights based on the established form. (Ex. A, pp. 542, 544-547). Hart said he knew his rights based on prior arrests and form when Hart was a victim of a crime. (Ex. A., p. 542, 558). Not withstanding, Mauer reviewed his rights with him again in detail. *Id.* According to Mauer, Hart was coherent at the time and appeared to understand what was said. *Id.* Hart was 17 years old at the time.

(Ex. A, p. 547). He understood English and did not give answers inconsistent with questions. *Id.* Mauer believed Hart to be alert, coherent, fully articulate, and able to exactly understand what was being discussed. (Ex. A, p. 562). After his rights were read, Mauer asked him if he was willing to answer questions without the presence of an attorney. (Ex. A, p. 545). Mauer told him to mark "yes" on the form if he agreed. If he did not agree, Mauer instructed him to mark "no." *Id.* Hart initialed "yes" on the form. *Id.* Mauer had him sign the form, whish says that the statement is signed of his own free will without any threats or promises having been made. *Id.*

After the form was signed, Mauer told Hart that he was investigating a homicide that occurred at a photo place, and that he wanted to find out what Hart knew about it. (Ex. A, p. 547-548). Hart said that he did not know anything about it. *Id.* Hart did not ask for an attorney before responding, nor did he indicate that he was unwilling to speak. *Id.* Mauer then told him that his photo had been picked out of a line up and that he was being

investigated. *Id.* At that point, Hart told Mauer that he wished to talk to with Detective Judi Shuster, who also worked with the North Miami Police Department (Ex. A, p. 548), but he did not ask for his grandmother or for a lawyer. (Ex. A, p. 549). Hart's grandmother was at the police station. (Ex. A, p. 566). Hart was not told that she was present until after his statement was taken. *Id.*

Mauer then arranged for Shuster to come to the station. *Id.* She arrived at approximately 2:00 p.m. (Ex. A. p, 575). Before Mauer left the room, Shuster asked Hart if his initials were on the *Miranda* form. (Ex. A, p. 564). She noted that they were. *Id.* Mauer left the room and did not reappear until Shuster later called him back int the interview room and stated that Hart wished to give a taped statement. *Id.* After Mauer took the taped statement, he had no further conversations with Hart. (Ex. A. p, 555). At no time during the taped interview did Hart indicate he wished to speak to a lawyer or any one else. (Ex. A, p. 555, 556). Mauer's

contact with Hart commenced around 1:00 p.m. and ended around 4:00 p.m. (Ex. A, p. 557).

Shuster testified that she knew Hart from working gangs and juveniles. (Ex. A, p. 573). She describes their relationship as "friendly," and stated that Hart knew she was a police officer. Id. At the time she spoke with Hart, she was wearing jeans and a t-shirt, not a uniform. *Id.* She understood that Hart believed he was under arrest. (Ex. A, p. 608). He was eating pizza. (Ex. A, p. 577). Hart did not complain about his treatment by the police. *Id.* When he finished eating, Shuster asked Hart why he wanted to talk with her. (Ex. A, p. 578). None of the discussion which followed was on tape. The only taping was of the confession.

Hart asked her if he was in "big trouble." *Id.* She replied that he was in the "biggest trouble" he could ever be in. *Id.* He asked Shuster what could happen to him. *Id.* She replied that if he was tried as an adult, he could be given death penalty. *Id.* He inquired whether he was to be tried as a juvenile or an adult. *Id.* She replied that she did not know, but surmised that, because of

the charges, it would not remain in juvenile court. (Ex. A, p. 579). Hart asked what she would do if she were in his shoes. *Id.* She told him that she could not answer that question, and that he had to make his own decision. *Id.* She told him to think about it. *Id.* She then left the room for five minutes. *Id.*

When Shuster returned to the interview room, Hart told her "lets get started." *Id.* He then asked what are the "pros and cons" of having an attorney in her opinion. (Ex. A, p. 580). She replied, "[I]f you have an attorney, he'll come in. He'll protect your rights. He'll tell you what to answer, what not to answer, and he'll be here for you." *Id.* She said this was a "pro." She then said, "[T]he con, in my opinion, is I'm going to want to ask you questions and he's going to tell you that you can't answer me." *Id.* Shuster testified that she answered Hart " in her opinion." *Id.* She did not advised him not to obtain counsel. *Id.* He did not question her about his *Miranda* rights. *Id.* Shuster told Hart that anything he told her she would tell the state. *Id.* None of this discussion was on tape. (Ex. A, p. 582).

After this discussion about the "pros and cons," hart said, "let's get started." (Ex. A, p. 582). Shuster asked him to state what happened on the evening of July 2nd . *Id.* During the time she was with Hart, he never asked for a lawyer. (Ex. A, p. 583). Nor did he request to speak to his grandmother, or express a desire to leave. *Id.* He never indicated to Shuster that he was uncomfortable speaking with her and wished to discontinue the taping. *Id.*

Hart testified that Shuster told him that he was in "a lot of trouble" and that he should help her and talk to her (Ex. A, p. 717-718). He claimed that he asked her for a lawyer at the time. *Id.* Hart said he asked Shuster for a lawyer a second time and she told him that she could not help him if he got a lawyer. *Id.* He testified that she told him that there were pros and cons of him getting a lawyer. *Id.* According to Hart, when Shuster told him that the lawyer would protect his rights he told her that he wanted a lawyer. *Id.* He claimed that the detective ignored his request and promised to help him by talking to the judge and prosecutor.

Id. Hart testified further that after Shuster told him that he could be sentenced to death, he again requested a lawyer, and she told him that she would not be able to help if he got a lawyer. (Ex. A, p. 719-20).

Hart further testified that Shuster left the room for about fifteen minutes, and that upon her return she asked what he wanted to do. According to Hart, he told her again that he wanted a lawyer and she insisted that she would not be able to help him if he was represented by counsel. (Ex. A, p. 721). Hart testified that, at that point, he told her of his involvement in the murders (Ex. A. p, 721).

Hart said at some point during the interview he asked Shuster's opinion as to whether he should get a lawyer and she told him that it would hurt "us" more than it would help. (Ex. A, p. 721-22). According to Hart, he gave the statement because he thought that Shuster would help him. (Ex. A, p. 722).

On cross-examination, Hart said he knew that he had a right to remain silent and that he could not be compelled to give

a statement (Ex. A, p. 726). He claimed that he invoked his right to remain silent with Detective Mauer because he did not trust him but that he trusted Shuster. (Ex. A, pp. 727-28, 748). He conceded that he did not consider Shuster's offer to speak to the prosecutor and the judge as a promise, but he felt that she would help him because she was his friend. (Ex. A, p. 760).

The trial judge found that Hart's testimony that he continuously asked for an attorney was not credible. (Supp. Ex. 1, p. 7). The trial judge further found that Hart's conversation with Shuster "weighs the possibility of an attorney" but could hardly qualify as an unequivocal request for counsel. (Supp. Exh. 1, p. 17). The trial judge found that Hart never made such a request in his tape statement, and that he was advised of his right to an attorney on the tape and prior to giving any statement. The trial judge found that Hart's statements were freely, voluntarily and intelligently made. (Supp. Ex. 1, p. 8).

IV. STANDARD OF REVIEW.

Hart's petition for writ of habeas corpus was filed on November 3, 2000. As such, it is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1218 (1996), which was effective as of April 24, 1996. The AEDPA establishes a more deferential standard of review of state habeas judgments. See 28 U.S.C. §; *Williams v. Taylor*, 529 U.S. 362, 402-03, 120 S. Ct. 1495 (2000). The Eleventh Circuit has recently articulated the applicable standard of review in *Fugate v. Head*, 2001 WL 930557 (11th Cir. August 16, 2001). As follows:

> First, § 2254 (e) (1) provides for a highly deferential standard of review for factual determinations made by state court. "[A] determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254 (e) (1); Bottoson v. Moore, 234 F. 3d 526, 531 (11th Cir. 2000).
>
> Second, § 2254 (d) allows federal habeas relief for a claim adjudicated on the merits in state court only where that adjudication in state court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). Section 2254 (d) (1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court" by requiring satisfaction of one of two conditions for issuance of the writ. Williams, 529 U.S. at 412, 120 S. Ct. 1495. The Supreme Court has explained the requirements in § 2254 (d) (1) as follows:

> **Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Unreasonable application" clause, a federal habeas court may grant the writ of the state court identifies the correct governing legal principle from this Court's decisions but unreasonable applies that principle to the facts of the prisoner's case. Id. at 412-13, 120 Ct. 1495.**

> The "contrary to" clause in § 2254 (d) (1) "suggests that the state court's decision must be substantially different" from the relevant Supreme Court precedent. Id. at 405, 120 S.Ct. 1495. Although a state court's decision that "applies a rule that contradicts" the governing Supreme Court law is "contrary," id, a state court decision that applies "the correct legal rule" based on Supreme Court law to the facts of the petitioner's case would not fit within the "contrary to" clause even if the federal court might have reached a different result relying on the same law. Id. at406, 120 S. Ct. 1495. In evaluating the "unreasonable application inquiry," id. at 409, 120 S. Ct. 1495, the federal court should consider whether the state court's application of the law was "objectively unreasonable" and should not apply the subjective "all reasonable jurists" standard, id. at 410, 120 S.Ct. 1495. The Supreme Court clarified that, under 28 U.S.C. § 2254(d) (1), the federal court may not issue the writ unless it finds that the state court applied Supreme Court law unreasonably. Id. at 411, 120 S. Ct. 1495.

Id. 2001 WL at *6 (emphasis added).

V. DISCUSSION.

1. *Effect of Finding Below*.

Prior to the AEDPA, § 2254 (d) (8) provided that factual findings by a state court were presumed to be correct unless "the Federal court on consideration of the record as a whole concludes

that such factual determination is not fairly supported by the record." 28 U.S.C.A. § 2254 (d) (8)(1994). Section 2254(e) (1), as enacted by the AEDPA, not only retains the presumption of correctness but also adds that the petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254 (e) (1). Fugate v. Head, 2001 WL at *27 n. 11. In this case, the trial judge made factual findings involving credibility by a written order, which, for some unknown reason, was not recorded or brought to the attention of the Florida Third District Court of Appeal. Evidently, the trial judges's order, recorded August 4, 1999, was entered of record prior to the rendition of the Third District Court of Appeal's decision on September 8, 1999. What is important for this record, however, is that a full and complete record was made at the suppression hearing and that the state trial court made findings relative to that record, although those findings were not before the Third District Court of Appeal when the case was reviewed on appeal. Nonetheless, when the record as a whole is considered, I

concluded that the state trial court's factual findings are fairly supported by the record, and that the Petitioner has not met his burden of rebutting the presumption of correctness by clear and convincing evidence.

2. *Effect of Davis v. United States*

By its *per curiam* decision, the Florida Third District Court of Appeal affirmed the trial judge's suppression order by reference to *State v. Owen*, 696 So. 2d 715 (Fla. 1997). In *Owen*, the Florida Supreme Court was asked whether the Florida Constitution created a different standard from the federal constitution regarding a suspect's right under *Miranda*. The Florida Supreme Court adopted the rule in *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350 (1994), whereby the United States Supreme Court established a bright-line test. According to *Davis*, once a defendant waives his or her *Miranda* rights, an officer is not required to clarify a suspect's equivocal request for counsel and may continue questioning a suspect until the suspect makes a clear assertion of the right to counsel. *Davis*, 512 U.S. at 458-59,

114 S. Ct. at 2355. In fact, the Court the Court stated: "*If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.*" *Id.* at 461-62, 114 S.Ct. At 2356 (emphasis added). In *Owen*, the Florida Supreme Court adopted this rule and held that, "Florida's Constitution does not place greater restrictions on law enforcement than those mandated under federal law when a suspect makes an equivocal statement regarding the right to remain silent." *Owen*, 696 So.2d at 720.

In his habeas petition, Hart argues that this Court is free to review the issue de novo because the state appellate decision cites a case which is "contrary to" settled Supreme Court case law. [Memorandum of Law in Support of Petition for Writ of Habeas Corpus, p. 9]. Hart claims that *Davis* does not apply to the instant cause because, according to Hart, this case involves the police misadvising him about the nature of the rights **before** he elected to waive them.

As noted above, a state-court decision is the Supreme Court's clearly established precedent: (1) if the state court applies a rule that contradicts the governing law as set forth in the Supreme Court case law, or (2) if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor*, 529 U.S. at 405-06, 120 S.Ct. at 1519-20. Neither situation applies here. The Florida Third District Court of Appeal correctly cited to, and applied, *Owen*, which in turn relied on *Davis*. Hart's discussion with Shuster, after his valid execution of the *Miranda* waiver form, was insufficiently clear to invoke his right to remain silent. Under similar circumstances, the Eleventh Circuit, applying *Davis*, withdrew from its prior decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel. *See Coleman v. Singletary*, 30 F 3d 1420, 1424 (11th Cir. 1994) ("because we are bound to follow the Supreme Court's holding in *Davis*, our decisions creating a duty to clarify a suspect's intent

upon an equivocal invocation of counsel are no longer good law. Furthermore, we have already recognized that the same rules should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel.") (citations omitted), *cert. denied by*, 514 U.S. 1086, 115 S.Ct. 1801 (1995).

2. *Miranda and Moran v. Burbine.*

Next, Hart argues that the Third District Court of Appeal's opinion was contrary to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Hart argues that Shuster's responses to his questions vitiated the impact and purpose of the prior *Miranda* warnings. I disagree. *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused. In particular, prior to the initiation of questioning, police must fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to "have counsel present...if [he] so desires." *Miranda*, 384 U.S. at 467-71, 86 S.Ct. At 1624-1926.

Beyond this duty to inform *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Miranda*, 384 U.S. at 473-74, 86 S.Ct. at 1627. *See also Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981).

The threshold inquiry is weather Hart was informed of his *Miranda* rights. Without dispute, the record before the Third District establishes that he was, and that he signed a *Miranda* waiver form. Hart's next claim is that the *Miranda* rights were not waived voluntarily, knowingly, and was thoroughly briefed by the defense and the State. While the Third District's *per curiam* opinion was silent on any analysis, there is no indication that the Third District Court of Appeal's affirmance was contrary to *Miranda* or *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986), which explained the two-part inquiry into whether a defendant's waiver of *Miranda* rights was voluntary, knowing,

and intelligent. As required by *Moran v. Burbine*, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Next, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequence of the decision to abandon it. Only if the "totally of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly concluded that the *Miranda* rights have been waived. Id. at 421, 106 S.Ct. At 1141 (*quoting Fare v. Michael* C., 442 U.S, 707, 99 S.Ct. 2560 (1979)) (citations omitted).

Whether applying a *de novo* or deferential standard, the result is the same. The trial judge below already has determined that Hart's assertions at the suppression hearing lacked credibility. [Supp. Ex. 1. p. 7]. By his Petition, Hart does not request a new evidentiary hearing on this issue and no reason is evident from the record to disturb the trial judge's credibility ruling. Rather, the

issue is one of law under the controlling Supreme Court precedents. Given the lengthy record on the suppression hearing, the Third District Court of Appeal's affirmance does not confront a set of facts that are materially indistinguishable from those in a decision of the Supreme Court from which its affirmance is a material departure. Moreover, applying *Moran*, Shuster's response to Hart's questions was not coercive, either alone or in context of the totality of the circumstances. Likewise, Hart's waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. He agreed that he understood those rights. He stated that he had a right to remain silent and that he could not be compelled to give the statement. [Ex. A, p. 726]. Hart also knew of his right to counsel, and even inquired of Shuster of the pros and cons of obtaining counsel. He was told that the attorney would be there protect his rights, and he would tell Hart not to answer her questions. [Ex. A, p. 581]. Considering the record as

a whole, there is no basis for habeas corpus relief pursuant to § 2254 (d).

WHEREFORE, Hart's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C.§ 2254 is **DENIED**.

DONE AND ORDERED this 30 day of August, 2001.

_____
ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

c.c.
United States Magistrate Judge Andrea M. Simonton

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